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Third report on the immunity of State officials from foreign criminal jurisdiction

By Concepción Escobar Hernández,
Special Rapporteur*

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I. Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session (2006) on the basis of a proposal contained in annex A to the report of the Commission on the work of that session.[1] At its fifty-ninth session (2007), the Commission decided to include this topic in its programme of work and appointed Roman A. Kolodkin[2] as Special Rapporteur. At the same session, the Secretariat was requested to prepare a background study on the topic.[3]

2. The former Special Rapporteur submitted three reports, in which he established the boundaries within which the topic should be considered and analysed various aspects of the substantive and procedural questions relating to the immunity of State officials from foreign criminal jurisdiction.[4] The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011.

3. At its 3132nd meeting, held on 22 May 2012, the Commission appointed Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5]

4. At the same meeting, the Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/654), which the Commission considered during the second part of its sixty-fourth session, held in 2012. The preliminary report was a "transitional report", in which the Special Rapporteur sought "to help clarify the terms of the debate up to [that] point and to identify the principal points of contention which remain[ed] and on which the Commission [might] wish to continue to work in the future" (paragraph 5). The report also identified the topics which the Commission would have to consider, established the methodological bases for the study, and set out a workplan for the consideration of the topic.

5. The Commission examined the preliminary report at its sixty-fourth session and approved the methodological bases and workplan proposed by the Special Rapporteur.[6] The Sixth Committee examined the preliminary report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the report of the International Law Commission during the sixty-seventh session of the General Assembly.[7]

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[1] See A/61/10, para. 257 and annex A.

[2] See A/62/10, para. 376.

[3] See ibid., para. 386. For the Secretariat study, see A/CN.4/596 and Corr 1.

[4] For the former Special Rapporteur's reports, see A/CN.4/601, 631 and 646.

[5] See A/67/10, para. 84.

[6] For a summary of that debate, see ibid., chap. VI.B. See also the provisional summaries of the work of the Commission contained in A/CN.4/SR.3143 to 3147, all available on the website of the International Law Commission (www.un.org/law/ilc/).

[7] The Sixth Committee considered the topic of the immunity of State officials from foreign criminal jurisdiction at its 20th to 23rd meetings during that session. In addition, two States referred to the topic at the 19th meeting. The statements made by States at those meetings are reflected in summary records A/C.6/67/SR.19 to 23. See also A/CN.4/657, sect. C, paras. 26 to 38.

6. At the sixty-fifth session, the Special Rapporteur submitted a second report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661), which examined the scope of the topic and of the draft articles, the concepts of immunity and jurisdiction, the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the normative elements of immunity *ratione personae*. The report contained six proposed draft articles, dealing with the scope of the draft articles (draft articles 1 and 2), definitions (draft article 3), and the normative elements of immunity *ratione personae* (draft articles 4, 5 and 6), respectively.

7. The International Law Commission considered the second report of the Special Rapporteur at its 3164th to 3168th and 3170th[8] meetings and decided to refer the six draft articles to the Drafting Committee.[9] On the basis of the report of the Drafting Committee, the Commission provisionally adopted three draft articles, dealing with the scope of the draft articles (draft article 1) and the normative elements of immunity *ratione personae* (draft articles 3 and 4), respectively. The draft articles contain the essential elements of five of the reworked draft articles proposed by the Special Rapporteur. The Commission also approved the commentaries to the three draft articles which it had provisionally adopted. The Drafting Committee decided to keep the draft article on definitions under review and to take action on it at a later stage.[10]

8. The Sixth Committee examined the second report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the report of the Commission during the sixty-eighth session of the General Assembly. States generally welcomed the report and the progress made in the work of the Commission, and commended the Commission for submitting three draft articles to the General Assembly.[11]

9. In its annual report, the Commission requested States to "provide information, by 31 January 2014, on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases 'official acts' and 'acts performed in an official capacity' in the context of the immunity of State officials from foreign criminal jurisdiction".[12] The Special Rapporteur wishes to thank those States that made reference to this issue during the debates in the Sixth Committee of the General Assembly. More specifically, she wishes to express her appreciation to the States that submitted written comments on this matter.[13]

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[8] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see A/CN.4/SR.3164 to 3168 and SR.3170, all of which are available on the Commission's website.

[9] See A/CN.4/SR.3174.

[10] For the treatment of the topic by the International Law Commission at its sixty-fifth session, see A/68/10, paras. 40 to 49. See in particular the draft articles with the commentaries thereto contained in paragraph 49 of the report of the Commission. For the Committee's discussions on the commentaries to the draft articles, see A/CN.4/SR.3193 to 3196.

[11] See A/C.6/68/SR.17 to 19. The texts of statements by delegates who participated in the debate can be found at http://papersmart.unmeetings.org/en/ga/sixth/68th-session/agenda. See also A/CN.4/666, which contains the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session, prepared by the Secretariat, in sect. B.

[12] A/68/10, para. 25.

[13] By the time the present report was completed, comments had been received from Belgium, Czech Republic, Germany, Ireland, Mexico, Norway, Russian Federation, Switzerland, United Kingdom of Great Britain and Northern Ireland, and the United States of America.

II. Immunity *ratione materiae*: normative elements

10. As noted in the second report of the Special Rapporteur, "the distinction between immunity *ratione personae* and immunity *ratione materiae* is one of the few matters on which there has been broad consensus during the Commission's discussions on this topic".[14] This is undoubtedly owing to the fact that such a distinction has been widely accepted in both doctrine[15] and jurisprudence. The distinction was also analysed in the memorandum by the Secretariat[16] and in the preliminary report of Special Rapporteur Kolodkin,[17] although in both cases the analysis was from a purely descriptive and conceptual standpoint. For its part, the Commission had addressed the distinction between the two types of immunity in 2013 from a normative perspective, with a view to establishing a separate legal regime for each one. This does not mean, however, that the two types of immunity do not have elements in common, especially in respect of the functional dimension of immunity in a broad sense.[18]

11. This approach was reflected in the work of the Commission at its sixty-fifth session. In this regard, attention should be drawn to the following points:

(a) Inclusion of the distinction between immunity *ratione personae* and immunity *ratione materiae* in the draft article on definitions which has been referred to the Drafting Committee: although the Committee has not yet taken a position on the definitions contained therein, no contrary opinions have been expressed as to the retention of separate types of immunity;[19]

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[14] A/CN.4/661, para. 47, *in fine*.

[15] In this respect, see, inter alia, C. Dominicé, "Problèmes actuels des immunités jurisdictionnelles internationales", in *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. II, J. Cadona Llorens, Pamplona, Aranzadi, 1999, pp. 323 to 326 and 337 to 342; V. Abellán Honrubia, "La responsabilité internationale de l'individu", in *Collected Courses of the Hague Academy of International Law*, vol. 280, Leiden, Martinus Nijhoff, 1999, pp. 220 to 223; A. Borghi, *L'immunité des dirigeants politiques en droit international*, Collection latine, Series II, vol. 2, Brussels, Bruylant, 2003, pp. 129 to 131; J. Verhoeven, "Les immunités propres aux organes ou autres agents des sujets du droit international", in *Le droit international des immunités: contestation ou consolidation*, Brussels, Larcier, 2004, pp. 64 to 67 and 94 to 107; A. Remiro Brotóns, "La persecución de los crímenes internacionales por los tribunales internacionales: el principio de universalidad", in *XXXIIII Cursos de Derecho Internacional* (2006), Washington, D.C., Organization of American Statesp. 505; J. Jorge Urbina, "Crímenes de guerra, justicia universal e inmunidades jurisdiccionales penales de los órganos del Estado", in *Anuario Mexicano de Derecho Internacional*, vol. 8, 2008, pp. 277 to 292; B. Stern, "Vers une limitation de l'"«irresponsabilité souveraine» des États et chefs d'État en cas de crime de droit international", in M. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflish*, The Hague, Brill, 2007, pp. 511 to 548; A. Cassese and others, *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, p. 368; J. Dugard, *International Law: A South African Perspective*, 4th ed., Johannesburg, Juta, 2011, p. 253; H. Fox and P. Webb, *The Law of State Immunity*, 3rd ed., Oxford, Oxford University Press, 2013; P. D'Argent, " Immunity of state officials and obligation to prosecute ", in Charles de Visscher Center for International and European Law (CeDIE) Working Papers, No. 4, 2013, pp. 5 to 7; and R. Maguire, B. Lewis and C. Sampford (eds.), *Shifting Global Powers and International Law: Challenges and Opportunities*, Abingdon, Oxon, Routledge, 2013, p. 108.

[16] See A/CN.4/596 and Corr.1, para. 88 ff.

[17] See A/CN.4/601, paras. 78 to 83.

[18] See A/CN.4/661, paras. 48 and 53.

[19] For such definitions, see ibid., para. 53.

(b) The very structure of the draft articles, consisting of a separate part (part two) on immunity *ratione personae*, to be followed by a third part on immunity *ratione materiae*;

(c) Draft article 4, paragraph 3, provisionally adopted by the Commission in 2013, which reflects the distinction between the regimes applicable to each of the types of immunity mentioned above, by stating that "the expiration of immunity *ratione personae* is without prejudice to the application of the rules of international law on immunity *ratione materiae*".[20]

12. As indicated in the second report of the Special Rapporteur, the basic characteristics of immunity *ratione materiae* can be identified as follows:

(a) It is granted to all State officials;

(b) It is granted only in respect of acts that can be characterized as "acts performed in an official capacity"; and

(c) It is not time-limited since immunity *ratione materiae* continues even after the person who enjoys such immunity is no longer an official.

13. These three elements adequately reflect the different definitions of immunity *ratione materiae* recognized by the doctrine[21] and found in jurisprudence. They also

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[20] For the distinction between the two types of immunity, see the Commission's commentary to draft article 4, in particular para. 7 of the commentary (A/68/10, para. 49).

[21] These definitions are presented using various formulations, but all of them reflect the same elements mentioned above. For Cassese, "functional immunity from the jurisdiction of foreign States covers activities performed by various State officials in the exercise of their functions and it survives the end of office", and the "official activities are performed by State organs on behalf of their State and, in principle, must be attributed to the State itself" (Cassese and others, The Oxford Companion, p. 368). For Fox, "functional immunity, immunity *ratione materiae*, is a term initially applied to diplomats on the loss of personal immunity on vacating office so as to continue immunity but solely for acts performed in an official capacity. It is, however, now used in a wider sense as applying to all officials, functionaries, and employees of staff, whether serving or out of office, to afford them immunity in respect of acts which are performed in an official capacity." (Fox and Webb, *State Immunity*, pp. 666 and 667); For Stern, "L' immunité du chef d'État en exercice est une immunité absolue, *ratione personae*, l'immunité ne continue à lui être accordée, lorsqu' il n'est plus en fonction, que pour seuls pour les actes "commis dans l'exercice de ses fonctions", c' est à-dire que l'ancien chef d'État ne bénéficie que d'une immunité *ratione materiae*"(The immunity of an incumbent Head of State is an absolute immunity *ratione personae*, which he or she will continue to enjoy after leaving office only for "acts performed in the performance of his or her functions"; this means that the former Head of State only enjoys immunity ratione materiae) (Stern, Vers une limitation, p. 521); For D'Argent, "all representatives of the State acting in that capacity" (United Nations Convention on Jurisdictional Immunities of States and their Property, art. 2 (1), (b) (iv)), enjoy immunity *ratione materiae* (also called 'official acts immunity') for the acts so performed, even if they have acted *ultra vires* ... in contrast with what is required for triggering immunity *ratione personae*, the concept of 'representatives of the State 'for the purpose of immunity *ratione materiae* is not limited to persons specifically embodying or personifying it". (D'Argent, Immunity of State officials, pp. 5 to 7); For Borghi, "l'immunité (*ratione personae*) n'est pas accordée à un chef d'État dans son propre intérêt, mais dans celui-ci de l'État qu'il dirige, il est normal que ... cesse de produire ses effets lorsque son mandat officiel prend fin ... L'immunité *ratione materiae* ... signifie qu'il est protégé pour ce qui a trait aux actes de la fonction" (immunity *ratione personae* is not granted to a Head of State for his or her personal benefit, but for the benefit of his or her State; it is normal that (...) such immunity should cease to operate when he or she leaves office. (...) Immunity *ratione materiae* (...) means that the person is

take into consideration the previous work of the Commission.[22] The normative elements that make up this type of immunity should be deduced from these three characteristics; based on the method followed with regard to immunity *ratione personae*, they should be identified as follows:

(a) The subjective scope of immunity *ratione materiae*: what persons benefit from immunity?

(b) The material scope of immunity *ratione materiae*: what types of acts performed by these persons are covered by immunity?

(c) The temporal scope of immunity *ratione materiae*: over what period of time can immunity be invoked and applied?

14. Although these three elements are accepted in general terms in relation to immunity *ratione materiae*, their meanings are not uniform. Thus, while there is broad consensus on the unlimited nature of the temporal scope of immunity *ratione materiae*, the material and subjective scope of such immunity is the subject of a broader discussion and still gives rise to controversy, not only in the doctrine but also in jurisprudence and practice. Determining the meanings of the expressions "official" and "acts performed in an official capacity" therefore requires detailed analysis. In any event, it should be noted that the three aspects mentioned above constitute the "normative elements" of immunity from foreign criminal jurisdiction *ratione materiae* and thus must be considered together, without the possibility of excluding any of them when defining the legal regime for this type of immunity.

15. On the other hand, it should be recalled that as indicated in the second report in relation to immunity *ratione personae*, identifying these three aspects as the normative elements of immunity *ratione materiae* does not mean that they are the only elements to be considered in defining the legal regime applicable to immunity *ratione materiae*. In particular, the Special Rapporteur wishes to emphasize that this should not be read as a pronouncement on exceptions to such immunity or as recognition that such immunity is absolute in nature.

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protected in relation to his or her official acts (Borghi, L'immunité des dirigeants politiques, pp. 129 and 130); For Jorge Urbina, "la amplitud de las inmunidades *ratione personae* reconocidas a los dirigentes políticos que ostentan la condición de órganos centrales del Estado para las relaciones internacionales (jefe de Estado, jefe de Gobierno o ministro de relaciones exteriores) se justifican por ser sus máximos representantes y por su papel esencial en el desarrollo de la política exterior. Por eso, cuando cesen en sus funciones, solo estarán amparados por las inmunidades *ratione materiae*, que, como sabemos, impedirían el inicio de una acción penal únicamente por los actos públicos realizados durante el ejercicio de la alta magistratura estatal" (The scope of immunity *ratione personae* afforded to political leaders who serve as central organs of the State in international relations (Head of State, Head of Government or Minister for Foreign Affairs) is justified because they are the highest-ranking representatives of the State or because they play a key role in the management of foreign policy. In this connection, when they leave office, they will only be protected by immunity *ratione materiae*, which would protect them against criminal action solely for public acts performed in the fulfilment of the highest functions of State (Jorge Urbina, Crímenes de guerra, justicia universal, pp. 287 to 288).

[22] With regard to the definition of the characteristics of immunity *ratione materiae*, see *Yearbook of the International Law Commission, 1991*, vol. II, Part Two [publication of the United Nations, Sales No. S.93.V.9 (Part 2)], commentary to draft article 2 of the Draft Articles on Jurisdictional Immunities of States and Their Property, in particular paras. 17 to 19.

16. Accordingly, the present report marks the starting point for the consideration of the normative elements of immunity *ratione materiae*, analysing in particular the concept of an "official".

III. Concept of an "official"

A. General considerations

17. The concept of an "official" is particularly relevant to the topic "Immunity of State officials from foreign criminal jurisdiction", because it determines the subjective scope of the topic. This is why the term is explicitly included in the title of the topic to refer to all persons who may be covered by immunity. This generic reference to "officials" is included in the title of the topic because the International Law Commission does not wish to limit the scope of the study to the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs.[23]

18. In this context, the concept of an "official" must be addressed horizontally, because its characteristics must be determined in such a way as to include both persons who would be covered by immunity *ratione personae* and those who would be covered by immunity *ratione materiae*. However, as pointed out in the second report, submitted to the Commission in 2013, the need to define the concept of an "official" clearly and unequivocally is particularly important in the case of immunity *ratione materiae*.[24] The reason for this is simple. Persons covered by immunity *ratione personae* can be and have been identified by the Commission *eo nomine*, with the listing of the three senior officials to whom such immunity applies, namely the Head of State, the Head of Government and the Minister for Foreign Affairs.[25] In the case of immunity *ratione materiae*, however, it is impossible to draw up a list of all the office or post holders who would be classified as "officials" for the purposes of the present topic. That would simply not be feasible, given the wide variety of models which exist in State systems. Consequently, the persons covered by immunity *ratione materiae* can only be determined using "identifying criteria" which, applied on a case-by-case basis, provide sufficient reason to conclude that a given person is an "official" for the purposes of the present draft articles.

19. Secondly, it should be emphasized that the use of the term "official" is the result of a proposal of former Special Rapporteur Kolodkin, who stated his preference for that term over "organ", although he left open the possibility of a future debate and a change of terminology if the Commission deemed it appropriate.[26] At that time, however, various members of the Commission noted that

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[23] In the summary used by the Commission as the basis for including the topic in its long-term programme of work, the emphasis was placed on the Head of State, the Head of Government, the Minister for Foreign Affairs and other senior State officials (A/61/10, annex A, para. 19 (4)). For his part, the former Special Rapporteur, in his preliminary report, adopted a broad approach by referring to all officials (A/CN.4/601, paras. 106 and 107). Although in the Commission's discussions on the preliminary report some members expressed the opinion that only the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs should be considered (A/63/10, para. 289), that broad approach has been followed ever since.

[24] A/CN.4/661, para. 32; see also paras. 56 and 57.

[25] See draft article 3, provisionally approved by the Commission in 2013 (A/68/10, para. 48).

[26] See A/CN.4/601, para. 108.

other terms, such as "agent" or "representative", could be used.[27] The question was subsequently reiterated in the current Special Rapporteur's previous reports, in which she pointed out that "official" may not be the most suitable term for referring to all categories of persons who would be covered by immunity from foreign criminal jurisdiction. It should be noted, moreover, that the terms used in the various language versions are neither homogenous nor interchangeable, and cannot be said to have identical or similar meanings.[28]

20. In view of these considerations, the Special Rapporteur stated in her second report that the concept of an "official" would be analysed during the consideration of immunity *ratione materiae* and that the term "official" would continue to be used on a provisional basis as the single designation applicable to all categories of persons covered by either of the two types of immunity from foreign criminal jurisdiction considered by the Commission.[29] This proposal was endorsed by the Commission and reflected in the footnote to draft article 1, paragraph 1, provisionally adopted in 2013, which stated that "the use of the term 'officials' will be subject to further consideration".[30]

21. Consequently, because the definition of the concept of an "official" is essential for the present topic,[31] the present report will specifically look into the definition of persons who may be considered beneficiaries of immunity from foreign criminal jurisdiction, or, in line with the terminology used by the Commission to date, the definition of the concept of an "official". To perform this task correctly, at least four premises must be considered:

(a) The general scope of the concept of an "official" has not been defined in international law;

(b) Any definition of the concept of "official" must encompass both persons covered by immunity *ratione personae* and persons covered by immunity *ratione materiae*;

(c) The term chosen as a single designation for all persons who enjoy immunity must take account of the differences between the categories of persons covered by immunity *ratione personae* and those covered by immunity *ratione materiae*;

(d) The terms used in each of the language versions to refer to persons who enjoy immunity must be homogeneous and comparable, and must, as far as possible,

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[27] See A/63/10, paras. 288 and 289.

[28] See A/CN.4/654, para. 66, and A/CN.4/661, para. 32.

[29] A/CN.4/661, para. 32, *in fine*.

[30] A/68/10, footnote 244.

[31] The importance of defining the concept of an "official" has also been emphasized by States. See, for example, the statements by the following States at the last session of the Sixth Committee: Australia (A/C.6/68/SR.19, para. 81), Belarus (A/C.6/68/SR.18, para. 10), Chile (A/C.6/68/SR.18, para. 78), Ireland (A/C.6/68/SR.18, para. 121), Italy (A/C.6/68/SR.19, para. 5), Republic of Korea (A/C.6/68/SR.18, para. 107), Romania (A/C.6/68/SR.18, para. 112) and the Russian Federation (A/C.6/68/SR.19, para. 46). In addition, the following States have already expressed their views on the terminological question or on the criteria for identifying an "official": Chile (A/C.6/68/SR.18, para. 79), Malaysia (A/C.6/68/SR.19, para. 37), the Netherlands (A/C.6/68/SR.18, para. 31), Portugal (A/C.6/68/SR.17, para. 9), Spain (A/C.6/68/SR.17, para. 142) and Thailand (A/C.6/68/SR.19, para. 26).

follow the terminology previously consolidated in the practice of the International Law Commission.

22. In summary, the analysis of the concept of an "official" poses two types of different yet complementary and interrelated questions. The first is substantive in nature and concerns the criteria used to identify persons who may be covered by immunity from foreign criminal jurisdiction. The second is primarily language-related and concerns the choice of the most suitable term for designating persons who, in general, meet the above-mentioned substantive criteria. Each question will be analysed separately below.

23. In any case, to simplify the text and avoid confusion, the term "official", which is included in the title of the topic, will continue to be used provisionally in the present report.

B. Criteria for identifying persons who enjoy immunity

24. As stated *supra*, the general scope of the concept of an "official" has not been defined in international law.[32] However, because the definition of that term (and related terms) is different in each country's legal order, national definitions are of little use in defining the concept or even in choosing the most suitable term for referring to this category of persons. Accordingly, the starting point for a definition of the concept of an "official" and the criteria for identifying such a person for the purposes of the present topic can only be an approximation based on an analysis of judicial practice (national and international), treaty practice and the previous work of the Commission.

25. The Commission has already analysed these elements in relation to persons having immunity *ratione personae*, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. In doing so, it has also identified the elements which characterize these persons and justify their being recognized as having such immunity. Hence, as stated in the second report of the Special Rapporteur, immunity *ratione personae* is enjoyed by "a small number of people who perform State functions or hold State office at the highest level, by virtue of which they are authorized to represent the State at the international level".[33] Such representation of the State in international relations is "based on international law and is performed automatically, without the need for any express authorization by the State that they represent".[34]

26. In the same vein, the commentary to draft article 3, adopted by the Commission in 2013, states:

> The Commission considers that there are two reasons, representational and functional, for granting immunity *ratione personae* to Heads of State, Heads of Government and ministers for foreign affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no

[32] The 2008 memorandum by the Secretariat (see A/CN.4/596 and Corr.1, para. 5) and the preliminary report of Special Rapporteur Kolodkin (see A/CN.4/601, para. 108) take this observation as their starting point.

[33] A/CN.4/661, para. 57.

[34] Ibid., para. 59.

need for specific powers to be granted by the State. Second, they must be able to discharge their functions unhindered.[35]

27. The following criteria for identifying persons who have immunity *ratione personae* may be derived from the above:

(a) They occupy a special position within the State and hence have a special link with the State;

(b) They perform functions which fall under governmental authority, both within the State and in international relations;

(c) They represent the State internationally at the highest level simply by virtue of the post which they occupy.

28. In the light of the preceding paragraph, it is worth noting that the analysis of practice — particularly national judicial practice — presented below is limited to persons who would be covered by immunity *ratione materiae*. Through this limited perspective, we aim first to identify persons to whom immunity from foreign criminal jurisdiction has been applied or for whom it has been claimed. Second, we aim to determine whether the criteria for identifying the persons designated as "officials" have been defined in practice and, if not, whether they could be derived from the categories of persons previously identified.

1. National judicial practice

29. As indicated more than once, the issue of immunity from foreign criminal jurisdiction has not been considered extensively by national criminal courts. Indeed, there are only a few criminal cases in which there has been a reference to "officials" other than a Head of State, a Head of Government or a Minister for Foreign Affairs, and these have been limited to only a handful of States. On the other hand, this limited practice in criminal proceedings is counterbalanced by more abundant practice in civil proceedings which, although outside the scope of the present topic, is of relevance when it comes to identifying persons whom States deem to be covered by some form of immunity from jurisdiction.

30. The decisions of national courts have been analysed in reports and documents submitted to the International Law Commission since 2007, when the Commission first included this topic in its programme of work, a topic which has been reconsidered many times since. The analysis of these cases and other subsequent decisions of national courts bring to light some elements which may be of relevance in defining the concept of an "official".

31. First, it is important to note that in criminal proceedings in which national courts have upheld the immunity from jurisdiction of foreign officials, those who have been granted immunity from jurisdiction *ratione materiae* have held specific posts and performed specific functions within the State structure. They have included a former Prime Minister and Minister of Defence,[36] a Minister of the Interior,[37] senior officials (head of Scotland Yard),[38] and members of government

[35] A/68/10, para. 49, para. 2 of the commentary to draft article 3.

[36] *Association des familles des victimes du Joola* case, Cour de cassation, Chambre criminelle (France), judgement of 19 January 2010.

[37] *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, House of Lords (United Kingdom), judgement of 14 June 2006.

[38] *Church of Scientology* case, Federal Supreme Court (Germany), judgement of 26 September 1978.

security forces and institutions (a police officer[39] and a military officer,[40]) and an executive director of a maritime authority.[41]

32. Second, the range of persons who enjoy immunity from jurisdiction *ratione materiae* is much broader and more varied if civil proceedings brought against foreign officials for the purpose of obtaining financial compensation are taken into consideration. In such proceedings as well, immunity *ratione materiae* has been invoked successfully for certain categories of State officials. By way of example, judicial proceedings have been brought against a former Head of State,[42] a member of the Government,[43] a member of an executive commission,[44] the Attorney-General of the State of Florida and various lower-ranking Florida officials (a prosecutor and his legal assistants, a detective in the Attorney-General's office and a lawyer in a Florida state agency),[45] a former intelligence service chief[46] and a former head of a national security agency.[47]

33. Third, it must be pointed out that, on other occasions, claims of immunity from jurisdiction have not been upheld in domestic courts. However, even those courts have considered the status of the defendants as "officials", and thus their decisions as well must be taken into account. Specifically, such defendants have included former Heads of State[48] or Government,[49] a Vice-President and Minister of Forestry,[50] the family members of a former Head of State who did not hold any

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[39] *Schmidt v. Home Secretary of the Government of the United Kingdom*, Supreme Court (Ireland), judgement of 24 April 1997.

[40] *Mario Luiz Lozano* case, Corte Suprema di Cassazione, Sala Penale (Italy), judgement of 24 July 2008.

[41] *Agent judiciaire du trésor v. Malta Maritime Authority et Carmel X*, Cour de cassation, Chambre criminelle (France), judgement of 23 November 2004.

[42] *Wei Ye, Hao Wang, Does, A, B, C, D, E, F, and Others Similarly Situated, v. Jiang Zemin and Falun Gong Control Office, A/k/a Office 610, United States Court of Appeals, Seventh Circuit*, judgement of 8 September 2004.

[43] *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of New York County (United States of America), judgement of 31 October 1988.

[44] *Chiudian v. Philippine National Bank*, United States Court of Appeals, Ninth Circuit, judgement of 29 August 1990.

[45] *Jaffe v. Miller et al.*, Court of Appeal for Ontario (Canada), judgement of 17 June 1993.

[46] *Ali Saadallah Belhas et al. v. Moshe Ya'alon*, United States Court of Appeals, District of Columbia Circuit, judgement of 15 February 2008.

[47] *Ra'Ed Mohamad Ibrahim Matar et al. v. Avraham Dichter*, United States District Court, Southern District of New York, judgement of 2 May 2007.

[48] *Republic of the Philippines v. Ferdinand E. Marcos et al.*, United States Court of Appeals, Second Circuit, judgement of 26 November 1986; and *Regina v. Bartle and the Commissioner of Police et al. ex parte Pinochet*, House of Lords (United Kingdom), judgement of 24 March 1999.

[49] *Marcos Pérez Jiménez v. Miguel Aristigueta and John E. Maguire*, United States Court of Appeals, Fifth Circuit, judgement of 12 December 1962.

[50] *Teodoro Nguema Obiang Mangue et al.* case, Cour d'appel de Paris, Pôle 7, Deuxième chambre de l'instruction [(France)], judgement of 13 June 2013. This judgement is interesting also because it is the only instance in which a national court appears to restrict the immunity from foreign criminal jurisdiction of any State official to immunity *ratione materiae*. The judgement was issued in response to a complaint made by the Republic of Equatorial Guinea in the context of criminal proceedings for money-laundering and concealment of assets against various persons, among them Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who at the time was the country's Vice-President and Minister of Forestry. Equatorial Guinea applied for nullification of the arrest warrant issued against Mr. Nguema on the grounds,

position in the Government,[51] a Minister of Defence,[52] former Ministers of Defence,[53] a Minister of State,[54] heads of national security agencies,[55] an army colonel[56] and other lower-ranking military personnel (Italian sailors),[57] border guards[58] and a civil servant (formerly in the military).[59]

34. On the other hand, it should be noted that in the cases where foreign officials have been afforded immunity from criminal jurisdiction *ratione materiae*, national courts have linked that immunity from jurisdiction to their status as agents of the State. The House of Lords, for instance, in a lawsuit brought against various Saudi officials, concluded that "all the individual defendants were at the material times acting or purporting to act as servants or agents" and "their acts were accordingly attributable to the Kingdom".[60] In another case adjudicated by the Federal Supreme Court of Germany, in which the conduct of British police officers was at issue, the Court stated that "Scotland Yard — and consequently its head — was acting as the

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inter alia, that France had violated the immunity enjoyed by Heads of State and others holding high-level posts in a foreign Government. The Cour d'appel acknowledged that "la coutume internationale, en l'absence de dispositions internationales contraires, s'oppose à la poursuite des États devant les juridictions pénales d'un État étranger, et que cette coutume s'étend aux organes et entités qui constituent l'émanation de cet État, ainsi qu'à leurs agents en raison d'actes qui relèvent de la souveraineté de l'État concerné, ce principe trouve ses limites dans l'exercice de fonctions étatiques" (international custom, in the absence of international provisions to the contrary, opposes the criminal prosecution of States in foreign States, and that this custom extends to organs or entities that are an extension of the State, as well as to their agents, for acts falling within the sovereignty of the State in question, provided they are performed in the fulfillment of State functions), adding that the crimes being prosecuted "sont détachables de l'exercice des fonctions étatiques protégées par la coutume internationale au nom des principes de souveraineté et d'immunité diplomatique"(are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity) (Grounds, sect. C, second, third and fourth paras.).

[51] *Maximo Hilao et al., Vicente Clemente et al., Jaime Piopongco et al. v. Estate of Ferdinand Marcos*, United States Court of Appeals, Ninth Circuit, judgement of 16 June 1994.

[52] *General Shaul Mofaz* case, Bow Street Magistrates' Court (United Kingdom), judgement of 12 February 2004.

[53] *Teresa Xuncax, Juan Diego-Francisco, Juan Doe, Elizabet Pedro-Pascual, Margarita Francisco-Marcos, Francisco Manuel-Méndez, Juan Ruiz Gómez, Miguel Ruiz Gómez and José Alfredo Callejas v. Héctor Gramajo and Diana Ortiz v. Héctor Gramajo*, United States District Court, District of Massachusetts, judgement of 12 April 1995; and *A. v. Office of the Attorney-General of Switzerland, B. and C.*, Federal Criminal Tribunal (Switzerland), judgement of 25 July 2012.

[54] *Ali Ali Reza v. Grimpel*, Cour d'appel de Paris (France), judgement of 28 April 1961.

[55] *Bawol Cabiri v. Baffour Assasie-Gyimah*, United States District Court, Southern District, New York, judgement of 18 April 1996; and *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice, Queen's Bench Division Administrative Court (United Kingdom), judgement of 29 July 2011.

[56] *Public Prosecutor (Tribunal of Milan) v. Adler et al.*, Tribunale di Milano, Quarta Sezione Penale (Italy), judgement of 1 February 2010.

[57] *Italy v. Union of India and Massimiliano Latorre et al. v. Union of India*, Supreme Court (India), judgement of 18 January 2013.

[58] *Border Guards Prosecution Case*, Federal Supreme Court (Germany), judgement of 3 November 1992.

[59] *R. v. Lambeth Justices ex-parte Yusufu*, Divisional Court (United Kingdom), judgement of 8 February 1985.

[60] *Jones* v. *Ministry of Interior of the Kingdom of Saudi Arabia*, House of Lords (United Kingdom), judgement of 14 June 2006 (Lord Bingham of Cornhill, paras. 11 and 13).

expressly appointed agent of the British State so far as the performance of the treaty in question (...). The acts of such agents constitute direct State conduct and cannot be attributed as private activities to the person authorized to perform them."[61] The Supreme Court of Ireland took a similar position when it stated that a police officer "was purporting and intending to perform and in fact was performing the duties and functions of his office".[62] French courts have commented on this relationship between a prosecuted official and the State, noting in connection with the executive director of a maritime authority that "he is being held accountable for acts which he performed as part of his functions as a public official on behalf and under the control of the State of Malta".[63] In respect of the immunity from criminal jurisdiction of a former Minister of Defence of Senegal, they held that "[this minister,] because of the specificity of his functions and their primarily international scope, must be able to act freely on behalf of the State he represents".[64]

35. The relationship between an official and the State has also been taken into account in the reasoning of domestic courts that have entertained civil complaints against officials. Examples of this can be found in several United States precedents granting immunity from jurisdiction when an official was acting on behalf of the State, that is, "acting pursuant to (his) official capacity"[65] and "as an agent or instrumentality of the state".[66] Following this same principle, a contrario sensu, United States courts have held that a "lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts".[67]

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[61] *Church of Scientology* case, Federal Supreme Court (Germany), judgement of 16 September 1978 (published in *International Law Reports*, vol. 65, p. 198).

[62] *Schmidt* v. *Home Secretary of the Government of the United Kingdom*, Supreme Court (Ireland), judgement of 24 April 1997.

[63] *Agent judiciaire du trésor* v. *Malta Maritime Authority et Carmel X*, Cour de cassation, Chambre criminelle (France), judgement of 23 November 2004. The official French text reads, "qu' il lui est fait grief d'actes de puissance publique accomplis dans le cadre de ses fonctions pour le compte et sous le contrôle de l'État de Malte".

[64] *Association des familles des victimes du Joola* case, Cour de cassation, Chambre criminelle (France), judgement of 19 January 2010. The full official French text states : "la même immunité doit être reconnue à N, en tant qu'ancien ministre des forces armées du Sénégal, exerçant les fonctions de ministre de la défense; que ce ministre, de par la spécificité de ses fonctions et de son action prioritairement dirigée vers l'international, doit pouvoir s'en acquitter librement pour le compte de l'Etat qu'il représente".

[65] *Ra'Ed Mohamad Ibrahim Matar et al. v. Avraham Dichter*, United States District Court, Southern District of New York, judgement of 2 May 2007.

[66] *Ali Saadallah Belhas et al. v. Moshe Ya'alon* case, United States Court of Appeals, District of Columbia Circuit, judgement of 15 February 2008.

[67] *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court, New York County (United States of America), judgement of 31 October 1988; *Chiudian v. Philippine National Bank*, United States Court of Appeals, Ninth Circuit, judgement of 29 August 1990; *Maximo Hilao et al., Vicente Clemente et al., Jaime Piopongco et al. v. Estate of Ferdinand Marcos*, United States Court of Appeals, Ninth Circuit, judgement of 16 June 1994; *Teresa Xuncax, Juan Diego-Francisco, Juan Doe, Elizabet Pedro-Pascual, Margarita Francisco-Marcos, Francisco Manuel-Méndez, Juan Ruiz Gómez, Miguel Ruiz Gómez and José Alfredo Callejas v. Héctor Gramajo* and *Diana Ortiz v. Héctor Gramajo*, United States District Court, District of Massachusetts, judgement of 12 April 1995; and *Bawol Cabiri v. Baffour Assasie-Gyimah*, United States District Court, Southern District of New York, judgement of 18 April 1996.

36. The conclusion to be drawn at the outset from this practice is that the officials who a foreign jurisdiction has prosecuted or has attempted to prosecute, and in respect of whom the issue of immunity from jurisdiction has been invoked, are a diverse group. They also fall into very different categories as to their connection with the State. While some of them, for instance, have an eminently political connection owing to the political mandate they have received (a minister or other member of Government, an Attorney-General, the head of a national security agency, etc.), others have an administrative connection as members of the civil or military structure of the State (diplomats, prosecutors or other members of an Attorney-General's office, police officers, members of the armed forces, customs agents, etc.).

37. As a direct corollary, it should be noted that there are two main categories of officials, depending on the position they hold and the extent of their influence and power of decision within the State. The first category, which represents the majority in the jurisprudence analysed, comprises officials in the highest ranks of the State structure (civil or military), who head ministerial or other departments or administrative bodies (understood broadly) within the State, have extensive power of decision and, on occasion, are qualified to represent the State either domestically or internationally (the latter by express authority from the State). The second group, which represents the minority, comprises any officials who have no power of decision and who simply carry out decisions taken by higher-ranking officials. This makes it possible to differentiate between "high-level officials" and "other officials", a distinction frequently referred to in international jurisprudence, State practice and legal writings. As to the two categories, national judicial practice shows that the majority of foreign officials with respect to whom immunity from criminal jurisdiction *ratione materiae* has been invoked are found in the high or middle ranks of Government, and that there are very few cases in which immunity has been invoked in connection with low-ranking officials. In any event, jurisprudence does not support the conclusion that all high-level officials are necessarily those who have a primarily political connection with the State.

38. Lastly, it should be noted that, as a general rule, national courts do not set out the criteria for identifying a person as an "official", except for references to the performance of public functions or to actions as an agent of the State, in its name or on its behalf.

2. International judicial practice

39. Several international courts have directly or indirectly pronounced on matters involving the immunity of State officials from foreign criminal jurisdiction, notably the International Court of Justice, which has heard cases related to the issue on two occasions and has therefore had to consider the wide variety of persons holding certain State positions who could fall within the concept of an "official". In the *Arrest Warrant* case, for instance, the Court considered the immunity from foreign criminal jurisdiction of the Minister for Foreign Affairs of the Democratic Republic of the Congo and, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, it considered the immunity from foreign criminal jurisdiction of the President of the Republic, the *procureur de la République* and the Head of National Security of Djibouti.

40. In the *Arrest Warrant* case, the Court stated that "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[68] However, the Court in that case, as is known, focused on the Minister for Foreign Affairs, stating that "the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States".[69] These functions, which are analysed in detail by the Court, are derived from the exercise of the prerogatives inherent to the highest level of governmental authority.

41. In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the Court reiterated the position of high-level officials already stated in the *Arrest Warrant* case.[70] With regard to the treatment to be accorded the *procureur de la République* and the Head of National Security, the Court concluded that they did not benefit from immunity *ratione personae*, but did not pronounce on the applicability or non-applicability of immunity *ratione materiae*. In its analysis of that possibility, however, the Court did make statements that are relevant for defining the concept of an official to whom immunity *ratione materiae* would apply. For instance, the Court mentions specifically the condition that the acts performed by the aforementioned high-level officials "were indeed acts within the scope of their duties as organs of State".[71] The Court also states that it is not apparent that the principal argument made by Djibouti is that the persons in question "benefited from functional immunities as organs of State".[72] Lastly, the Court pointed out that Djibouti never informed France that "the acts complained of (...) were its own acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out".[73] These statements point to elements which, in the opinion of the Court, identify the persons who may benefit from immunity *ratione materiae*, namely those persons who clearly are organs of the State and act in the name or on behalf of the State. With regard to the first of these criteria, it should be noted that the Court uses the term "organ", which is employed in article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

42. In short, it may be deduced from the two judgments analysed here that the following elements are useful for defining the concept of an "official" for the purposes of the present topic: (a) the existence of two categories of persons who benefit, respectively, from immunity *ratione personae* and immunity *ratione materiae*; (b) the identification of the former as high-level officials who perform functions as representatives of the State at the international level; (c) the identification of the latter as organs of the State that act in the name and on behalf, of the State; and (d) the consideration of the performance of official functions as a key element for identifying persons who may be covered by immunity.

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[68] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3 (para. 51).

[69] Ibid., para. 53.

[70] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177 (para. 170).

[71] Ibid., para. 191.

[72] Ibid., para. 193.

[73] Ibid., para. 196.

43. The European Court of Human Rights has also heard several cases based on allegations in which immunity from the jurisdiction of national courts has been discussed and which in some way refer to alleged criminal conduct by persons whose status could fall within the concept of an official analysed in the present report. It should be noted that, in these cases, the judgements of the European Court do not refer to immunity from foreign criminal jurisdiction but to immunity from civil jurisdiction[74] and that the Court pronounces on the compatibility of immunity from civil jurisdiction with the right to fair trial recognized in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950.

44. In the case of *Al-Adsani v. the United Kingdom*, for instance, which has been studied by the Commission, the facts underpinning the application are the detention and torture that the applicant allegedly suffered at the hands of Sheikh Jaber Al-Sabah Al-Saud Al-Sabah and two other persons in a Kuwaiti State security prison and the palace of the Emir of Kuwait's brother to which the applicant had been transported in government vehicles. However, the European Court of Human Rights in that case addressed only the issue of Kuwait's immunity from civil jurisdiction in the British courts; it did not rule on the possible immunity of the persons who committed the acts of torture because the British courts had already heard the case against the three persons in question, issuing judgement in absentia against the Sheikh and giving the applicant leave to take action against the other two persons.[75] The *Al-Adsani* judgement therefore provides no elements for defining the concept of an "official" for the purposes of the present topic.

45. The recent judgement in the case of *Jones and others v. the United Kingdom*, however, is of greater interest for the purposes of the present report. Although the European Court of Human Rights maintained that it was taking the same position it had taken in the *Al-Adsani* case, in the *Jones* case, it did not rule on a civil suit filed against the State (Saudi Arabia), but on the immunity from civil jurisdiction associated with civil complaints filed against individuals acting as organs of the State. In the *Jones* case, the applicants alleged that they were tortured during their detention by Saudi Arabian officials, leading them to file civil suits in the British courts against those officials and against the Saudi Arabian State itself, seeking redress for the harm suffered. The individuals against whom legal action was taken in the United Kingdom were the Minister of the Interior, a lieutenant colonel, the deputy director of the prison where some of the applicants had been held, and two police officers. Initially, the High Court rejected the complaints filed against Saudi Arabia and the aforementioned officials on the grounds that both benefited from immunity from civil jurisdiction.[76] The Court of Appeal allowed the appeal and

[74] The European Court of Human Rights refers specifically to the distinction between civil and criminal proceedings in its judgement in the case of *Al-Adsani v. the United Kingdom* (application No. 35763/97), of 21 November 2001, paras. 34, 61 and 66. The distinction, however, was rejected by the judges who voted against the judgement (see the joint dissenting opinion of Judges Rozakis and Caflish, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić). The distinction was again highlighted by the European Court of Human Rights in the case of *Jones and others v. the United Kingdom* (applications Nos. 34356/06 and 40528/06), of 14 January 2014, para. 207. The distinction was also criticized in the dissenting opinion of Judge Kalaydjieva. The Government of the United Kingdom, however, accepted the distinction (see para. 179 of the judgement).

[75] See paras. 14 and 15 of the *Al-Adsani* judgement.

[76] Decisions of the Master of the High Court of 30 July 2003 and 18 February 2004.

gave the applicants leave to sue the individuals named in the claim, on the grounds that those persons did not enjoy immunity from civil jurisdiction, because the claim in question referred to acts of torture.[77] The House of Lords, however, ultimately declared that the individuals sued did have immunity because it considered them to be agents or officials of the State and understood the acts in question to be acts of the State, even though they were acts of torture, and the State has immunity.[78]

46. In its judgement of 14 January 2014, the European Court of Human Rights continued and developed the arguments already set out in the *Al-Adsani* case, pronouncing on the characteristics of the persons who presumably committed the impugned acts, their connections with the State and the nature of the acts in question. After examining the matter, the Court concluded that the immunity declared by the British courts in the case is not compatible with the right to a fair trial established in article 6 of the European Convention on Human Rights. That was the first case in which the Court pronounced on the subject,[79] and the judgement speaks of the evolution of the issue in contemporary international law, and refers to the work of the International Law Commission.[80] The judgement is of sufficient interest to warrant profound analysis from different angles. However, as far as the topics covered by this third report are concerned, it must be stressed that the Court does not provide a detailed analysis of the elements that make it possible to classify a person as an official; instead it simply stated that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State,[81] adding that "individuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties".[82]

47. In short, the Court reiterated the two basic elements that have been upheld in national and international jurisprudence: the existence of a connection between the State and the individual who acts on its behalf; and the performance of official functions. In any event, it should be noted that the immunity considered by the Court was immunity *ratione materiae*, which it applied to all the persons sued in the United Kingdom in this case, amongst them several high-level officials, including the Home Secretary.

48. International criminal courts have tried persons who, for the purposes of this report, could be categorized as "officials". As far as the matter at hand is concerned, however, those cases were based on the principle that the official position of the defendant is irrelevant and that immunity from prosecution cannot be invoked in the international criminal courts. Consequently, judgements that could be helpful for defining the concept of an "official" are not often to be found in the case law of these courts. However, the judgement of 29 October 1997, handed down by the

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[77] Judgement of 28 October 2004 (published in [2004] EWCA Civ 1394, [2005] 4 LRC 599).

[78] *Jones v. Minister of the Interior of the Kingdom of Saudi Arabia*, House of Lords (United Kingdom), judgement of 14 June 2006 (published in *All England Law Reports*, [2007] 1 All ER, 10 January 2007, pages 113 to 146).

[79] This led two judges of the European Court of Human Rights to propose in their respective opinions that the case should have been relinquished to the Grand Chamber for it to consider whether the doctrine set forth in the *Al-Adsani* judgement remained good law. See the concurring opinion of Judge Bianku and the dissenting opinion of Judge Kalaydjieva.

[80] See the judgement in the case of *Jones and others v. the United Kingdom*, paras. 95 to 101.

[81] Ibid., para. 204.

[82] Ibid., para. 205.

Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the case *Prosecutor v. Tihomir Blaskic* is an exception to that rule inasmuch as it contains some observations on the subject.[83]

49. In the *Blaskic* case, the Appeals Chamber responded to the appeal filed by Croatia against the decision of Trial Chamber II, of 18 July 1979. The appeal challenged the Tribunal's power to subpoena States or officials of a State for production of evidence. In its response, the Appeals Chamber pronounced on the relationship between a State and its officials and, in that context, concluded that State officials ("responsables officiels d'États" in French and "funcionarios públicos" in Spanish) acting in their official capacity enjoy a "functional immunity", which is a well-established rule in customary international law.[84] This is justified on the basis of the characteristics of such persons, whom it refers to in other parts of the judgement as "mere instruments of a State", "an instrumentality of his State apparatus"[85] or as acting "on behalf of a State".[86] In any event, officials act only as State organs when they are performing their official functions;[87] otherwise, they fall into the category of "individuals acting in their private capacity".[88] It can thus be concluded that, for the International Tribunal for the former Yugoslavia as well, the concept of an official is linked to action in the name and on behalf of a State and to the performance of official functions.

3. Treaty practice

50. Although the concept of an "official" is not defined in general international law, it is possible to find treaties that use the term or more broadly refer to categories of persons that might be covered by the concept. In the present report, the analysis focuses exclusively on a set of multilateral treaties that are particularly relevant to the topic under discussion, either because they contain provisions on the immunity from jurisdiction of a State or its officials, or because they use the concept of State official as an essential element for defining the legal regime which they establish.

(a) Vienna Convention on Diplomatic Relations

51. The Vienna Convention on Diplomatic Relations, adopted on 18 April 1961, uses the expression "funcionarios diplomáticos"[89] in the preamble of the Spanish version, which it then replaces with "agente diplomático" in the operative part, which states that the head of a mission and other diplomatic staff are also included[90] ("diplomatic agent" is used on both occasions in the English version). The Convention does not, however, define in substantive terms what is meant by the term, doubtlessly because there is broad international consensus on what it refers to. The same occurs in the work of the International Law Commission that paved the

[83] International Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Blaskic*, IT-95-14-AR 108, 29 October 1997.
[84] Ibid., para. 38.
[85] Ibid., paras. 38, 44 and 51.
[86] Ibid., para. 38.
[87] Ibid., para. 44.
[88] Ibid., para. 49.
[89] Vienna Convention on Diplomatic Relations, preamble, para. 1.
[90] Ibid., art. 1(e).

way for the Convention.[91] It should be noted, however, that the Convention covers other categories of persons connected with diplomatic missions who are not diplomatic agents. The functions of persons in these categories, including members of the administrative and technical staff and members of the service staff, are briefly described in article 1 of the Convention.

52. Persons in all these categories are granted some form of immunity from jurisdiction, even if the scope of that immunity varies for each category: the immunity extended to diplomatic agents is the broadest; and the immunity extended to members of the service staff is the narrowest.[92] Lastly, it should be noted that "private servants" do not enjoy any immunity whatsoever unless the receiving State voluntarily grants it to them.[93] The common element in the recognition of the immunity of these persons is that they perform certain functions in the service of the sending State, with which they have a formal connection, regardless of the legal nature of that connection (i.e. whether it is statutory or contractual). There is no doubt whatsoever as to the nature of these functions, as they are referred to in the Convention: they are public and official functions and activities. In short, they are all performed for the purpose of carrying out the functions of a diplomatic mission set out in article 3 of the Convention, which are a clear manifestation of governmental authority. This connection with public functions is strongest in the case of diplomatic agents, who, under article 42, "shall not in the receiving State practise for personal profit any professional or commercial activity". For the other categories of mission staff, the reference to the connection with the sending State and the public aims of the mission's activities is equally apparent in the continuous reference to "official functions" as the parameter for granting some form of immunity from jurisdiction.

53. It should also be borne in mind that the Vienna Convention on Diplomatic Relations accords particular importance to the special connection between the aforementioned categories of persons and the State, namely nationality. Although that connection is not critical for the performance of diplomatic, administrative, technical or service functions in a diplomatic mission, it has a bearing on the regime applicable to immunity from jurisdiction and is relevant to the topic discussed in the present report.[94] Article 38, for instance, limits the immunity from jurisdiction of a diplomatic agent who is a national of, or permanently resident in, the receiving State to "official acts performed in the exercise of his functions". At the same time, the article does not recognize any kind of immunity for the other categories of persons who are in the same situation; they can enjoy immunity only if the receiving State freely and voluntarily grants it to them. The relationship between the recognition of immunity and the performance of official functions in the name of the State is thus reinforced. That relationship was already highlighted by the International Law Commission itself, when in its commentary to draft article 37 (later article 38.1 of the Convention), it stated that in this case it was necessary to ensure that a

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[91] See *Yearbook of the International Law Commission, 1958*, vol. II, which contains the Draft Articles on Diplomatic Intercourse and Immunities, adopted on second reading. It should be noted that there is no commentary to article 1, on definitions.

[92] See arts. 31 and 37, paras. 2 and 3.

[93] See art. 37, para. 4.

[94] See arts. 8 and 38.

diplomatic agent in this situation would "enjoy at least a minimum of immunity to enable him to perform his duties satisfactorily".[95]

54. In short, it is the connection with the State and action on behalf of the State and the performance of official activities for its benefit through the diplomatic mission that make it possible to distinguish the categories of persons who, in the context of diplomatic relations, benefit from immunity. And it is therefore these elements that make it possible to identify State officials.

(b) Convention on Special Missions

55. The Convention on Special Missions, adopted on 16 December 1969, follows a similar pattern to the Vienna Convention on Diplomatic Relations by identifying the categories of mission staff members who enjoy some form of immunity. It does, however, introduce some small variations owing to the special nature of the type of diplomatic activity it covers. For instance, the Convention on Special Missions applies to the head of mission, the members of the diplomatic staff, members of the administrative and technical staff, and members of the service staff. It also includes the category of "representative", defined essentially by the special representative capacity conferred on that person by the State, regardless of the category into which the person falls.[96] It should be noted that the Convention never uses the term "official".

56. The regime of immunities from jurisdiction enjoyed by the above-mentioned categories of persons is like that established in the Vienna Convention on Diplomatic Relations, the functions performed within the mission again being the determining factor in defining both the categories of persons who enjoy immunity from jurisdiction and the scope of the immunity.[97] In this case, the connection with the State and the public nature of the functions is determined by the very definition of the special mission, namely "a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task".[98] This means, in addition, that the representatives of the State or the members of its diplomatic staff are also prohibited from practising "for personal profit any professional or commercial activity in the receiving State".[99] These criteria apply also to nationals or permanent residents of the receiving State, their immunity being restricted to "official acts performed in the exercise of their functions", in the case

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[95] See *Yearbook of the International Law Commission, 1958*, vol. II, "Report of the Commission to the General Assembly", chap. III, sect. II, para. 3 of the commentary to article 37.

[96] See art. 14, which establishes that "the head of the special mission or, if the sending State has not appointed a head, one of the representatives of the sending State designated by the latter is authorized to act on behalf of the special mission and to address communications to the receiving State". In article 1(e), a "representative of the sending State in the special mission" is defined as "any person on whom the sending State has conferred that capacity". It should be borne in mind that the representative of the State need not necessarily be a member of the diplomatic staff, as can be deduced from the distinction made between the two categories of persons throughout the Convention (see, for example, arts. 29, 31, 40(1), and 48).

[97] See, in particular, arts. 31, 36 and 37.

[98] See art. 1(a). The representative nature of the special mission is also referred to in the seventh preambular paragraph of the Convention.

[99] See art. 48.

of the representatives of the sending State and the members of the diplomatic staff of the mission.[100]

57. The Convention on Special Missions further envisages a specific category of persons in respect of whom it recognizes a special immunities regime, as stipulated in article 21:

> 1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.
>
> 2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.

58. The inclusion of this category of persons can doubtless be explained by the particularity of special missions and by the fact that, fairly frequently, they are headed by the Head of State, the Head of Government, the Minister for Foreign Affairs, another minister or another high-ranking authority of the State. The significance of this provision lies precisely in the distinction between two different categories of persons to whom two partially distinct regimes apply. The provision also introduces the expression "other persons of high rank", which did not appear in the Vienna Convention on Diplomatic Relations.[101]

59. In any case, the Convention on Special Missions also emphasizes the connection with the State, action on behalf of the State, and the exercise of official functions, making them the criteria for identifying the persons (State officials) who enjoy immunity. The concomitant inclusion of the reference to the Head of State, the Head of Government, the Minister for Foreign Affairs and other persons of high rank introduces the dimension of "high-level officials" who have a connection with the State beyond that of belonging to the State's administrative structure in a broad sense.

(c) Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character

60. The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, adopted on 14 March 1975, sets out in its article 1 the various categories of persons who are governed by the legal regime it establishes. Among them are not only the head of mission and the head of delegation, but also other members of the mission or delegation. This category includes the members of the diplomatic staff of the mission or delegation, the members of the administrative and technical staff, and the members of the service staff. As in the case of the Convention on Special Missions, the 1975 Vienna Convention does not provide a substantive definition of what is meant by head of

[100] See art. 40; and also art. 10.

[101] The Commission already noted the use of this expression in its commentary to draft article 3 (para. 11), provisionally adopted in 2013 (see A/68/10, para. 49).

mission or head of delegation; nor did the International Law Commission deal with this question in the *travaux préparatoires* of the Convention.[102]

61. This Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character establishes a regime of immunity from jurisdiction applicable to the persons mentioned above, which it bases on the nature of the relationship between the persons and the State and, in particular, on the nature of the functions they perform within the mission or delegation. Accordingly, the broadest immunity is given to the heads of mission or delegation and to the other members of the diplomatic staff of the mission or delegation,[103] and the most restricted is given to the members of the service staff.[104] It should be noted especially that, in the case of members of the administrative and technical staff, immunity from jurisdiction does not extend to acts performed outside the course of their duties,[105] and that in the case of members of the service staff, immunity from jurisdiction is restricted to acts performed in the course of their duties.[106] Also, members of the private staff enjoy immunity from jurisdiction only to the extent permitted by the host State.[107] Furthermore, the official nature of the duties assigned to persons who can be described as officials is reinforced by the fact that the Convention prohibits the head of mission and members of the diplomatic staff from practising "for personal profit any professional or commercial activity in the host State".[108] Lastly, a head of mission or delegation or any member of the diplomatic staff who is a national or permanent resident of the host State enjoys immunity only in respect of "official acts performed in the exercise of his functions".[109]

62. Similarly, with respect to delegations sent to international conferences sponsored by an international organization of a universal character, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character specifies, in its article 50, that the immunities accorded to them by international law are an adjunct to those that international law grants to the Head of State, the Head of Government, the Minister for Foreign Affairs or other person of high rank:

> 1. The Head of State or any member of a collegial body performing the functions of Head of State under the constitution of the State concerned, when he leads the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to Heads of State.
>
> 2. The Head of Government, the Minister for Foreign Affairs or other person of high rank, when he leads or is a member of the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the

[102] See the Draft Articles on the Representation of States in their Relations with International Organizations and the commentaries thereto in *Yearbook of the International Law Commission, 1971*, vol. II, Part One, "Report of the Commission to the General Assembly", chap. II, sect. D.

[103] See arts. 30 and 60.

[104] See arts. 36(3) and 66(3).

[105] See arts. 36(2) and 66(2).

[106] See arts. 36(3) and 66(3).

[107] See arts. 36(4) and 66(4).

[108] See art. 39.

[109] See arts. 36 and 37.

present Convention, the facilities, privileges and immunities accorded by international law to such persons.

63. Concerning persons of high rank, who are also referred to in the Convention on Special Missions, the International Law Commission made an interesting point in paragraph 6 of its commentary to draft article 50 of this Convention:

> The Commission ... took the view that the persons of high rank referred to in paragraph 2 were entitled to special privileges and immunities by virtue of the functions which they performed in their countries and would not be performing those functions as a head of mission. The expression 'person of high rank' therefore refers not to persons who because of the functions they perform in a mission are given by their State a particularly high rank, but to persons who hold high positions in their home States and are temporarily called upon to take part in a delegation to an organ or to a conference.[110]

64. The analysis of the legal regime under this Convention leads to conclusions similar to those applicable to the Vienna Convention on Diplomatic Relations or the Convention on Special Missions. Firstly, even though the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, like the others, does not expressly use the term "official" or define the categories of persons contemplated therein, it can be said that for all categories there is a connection between the beneficiaries of immunity from jurisdiction and the State on whose behalf they act, a connection that is unequivocally based on their performance of functions of a public nature. Secondly, the reference to persons of high rank in article 50 of the Convention once again introduces the idea of two partially distinct immunity regimes.

(d) Vienna Convention on Consular Relations

65. The Vienna Convention on Consular Relations, adopted on 24 April 1963, is somewhat different from the instruments analysed above in terms of both the categories of persons who are members of a "consular post" and the scope of their immunity from jurisdiction. The main characteristic of the Convention is that it makes a distinction between "consular officers" and "consular employees", the sole categories on which it confers immunity from jurisdiction.[111] The term "consular officer" means: "any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions".[112] The term "consular employee" means "any person employed in the administrative or technical service of the consular post".[113] An additional category introduced is that of "consular agents", referred to in article 69, where it is left to the States concerned to decide freely on the persons who perform consular functions and on the legal regime governing them. This is a category that was not, however, envisaged by the International Law Commission when it formulated the draft articles.

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[110] See the commentary to draft article 50 of the draft articles on the representation of States in their relations with international organizations, in *Yearbook of the International Law Commission, 1971*, vol. II, Part One, pp. 340 and 341.

[111] See art. 43. See also arts. 58(2) and 63 regarding honorary consular officers.

[112] See art. 1(d).

[113] See art. 1(e).

66. The immunity from jurisdiction recognized for consular officers and consular employees is more limited in scope than that recognized for diplomatic agents, because it is expressly linked to "acts performed in the exercise of consular functions".[114] Furthermore, immunity from civil jurisdiction is excluded in respect of actions "arising out of a contract concluded by a consular officer or a consular employee in which, he did not contract expressly or impliedly as an agent of the sending State".[115] Lastly, although the Convention does not recognize immunity from criminal jurisdiction in respect of a consular officer, it does expressly establish that any criminal proceedings shall be conducted "with the respect due to him by reason of his official position and ... in a manner which will hamper the exercise of consular functions as little as possible".[116]

67. Consequently, it has to be said that the Vienna Convention on Consular Relations puts even greater emphasis on the link between the granting of immunity to certain categories of persons and their exercise of specific functions on behalf of the State. As indicated before, such functions are manifestations of governmental authority. This is made clear by the nature of the functions listed in article 5 of the Convention and by the explicit provision that a consular officer may, under certain conditions, perform "diplomatic acts" or "act as representative of the sending State to any intergovernmental organization".[117] The connection between the categories of persons covered by immunity and the State thus becomes obvious. And this connection is reinforced by article 43, paragraph 2(a), which refers to a consular officer or a consular employee as "an agent of the sending State".[118]

68. From this standpoint, it can be concluded that the criteria for identifying the persons who enjoy immunity under the Vienna Convention on Consular Relations are based on the same parameters as those in the three conventions analysed earlier, namely the connection with the State, action on behalf of the State, and the exercise of official functions. The particular terminology used in the Convention should nevertheless be noted, including new terms like "officer", "employee" and "agents of the sending State".

(e) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

69. The fifth instrument worth considering is the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted on 14 December 1973. Even though this Convention does not concern immunities, it shares the same spirit as the other conventions analysed previously, namely to establish a special system applicable to certain categories of persons in terms of their connection with the State and by reason of their performance of specific functions of an international scope. Thus, analysing the categories of "protected persons" referred to in this Convention can be useful also in order to determine the criteria for identifying a category of persons as "officials" for the purposes of the present topic.

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[114] See art. 43(1).

[115] See art. 43(2).

[116] See art. 41(3). The Convention makes this same stipulation with respect to "honorary consular officers" subject to criminal jurisdiction (see art. 63).

[117] See art. 17.

[118] See also art. 71(1), which establishes restrictive rules in the case of consular officers who are nationals of or permanently resident in the receiving State.

70. In this connection, the relevant provision is article 1, paragraph 1, which lists the following "internationally protected persons":

> (a) A Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs ....
>
> (b) Any representative or official of a State ... .

71. This provision differs in some respects from the text of draft article 1 as adopted at the time by the Commission, which had read:

> "(a) A Head of State or a Head of Government ...
>
> "(b) Any official of ... a State ... who is entitled, pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State ... ."[119]

72. It should be noted that, in the text of the Convention which was eventually adopted, the reference to the Minister for Foreign Affairs was incorporated into subparagraph (a) and the reference to representatives was incorporated into subparagraph (b),[120] while the reference to entitlement to special protection by virtue of the performance of functions on behalf of the State was deleted from subparagraph (b).

73. This provision is of special interest because it deals in a general way with "all" the categories of internationally protected persons, assembling them into two distinct blocs that can be seen as corresponding to the two categories of persons envisaged by the Commission in its work on the immunity from foreign criminal jurisdiction of State officials, to whom immunity *ratione personae* and immunity *ratione materiae* would apply, respectively.

74. In its consideration of immunity *ratione personae*, the International Law Commission had already referred to article 1, paragraph 1, of this Convention in its commentary to draft article 3, adopted provisionally at its sixty-fifth session.[121] However, this provision of the Convention is equally relevant in defining the general concept of an "official" for the purposes of the present report, given its listing of persons who may be entitled to special protection by reason of their relation with the State and of the functions they perform in representation and in the name and on behalf of the State. Here, attention is drawn particularly to the Commission's commentary to draft article 1, adopted in 1972, where it distinguishes between the status of the Head of State and the Head of Government and that of all other officials and official persons. The former are identified *eo nomine* and the protection accorded them under international law attaches to their "status" and their

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[119] Draft Articles on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons, art. 1, in *Yearbook of the International Law Commission, 1972*, vol. II, "Report of the Commission to the General Assembly", chap. III, sect. B.

[120] The French and Spanish versions of the official texts of the Convention had included the term "personalid official" and "personnalité officielle" (official personality), respectively, in addition to "representative or official", owing to the fact that it had been used in the French version of draft article 1 adopted by the Commission: "toute personnalité officielle ou tout fonctionnaire d'un État" ("Any official person or any official of a State").

[121] A/68/10, para 49, commentary to draft article 3, especially para. 4 thereof.

having "the quality of Head of State or Government".[122] All other representatives or officials and official persons are defined by a series of requirements,[123] among them that they be "officials of a State", that is, "in the service of a State".[124] Moreover, their entitlement to international protection is "for or because of the performance of official functions".[125] These comments by the Commission are fully valid for article 1 of the Convention, even though the reference to the performance of functions in the name of the State has been dropped.

75. Thus, the 1973 Convention offers two interesting elements that are useful for the purposes of the present report. First, there are two different categories of persons who enjoy international protection on different grounds. Second, there is an emphasis on the connection with the State, either on account of the status or special position of the persons in question, or because of the fact that certain persons act in the name of the State. Another terminological point should be added: the Convention reserves the term "official" for the second category of persons, which it uses jointly with the terms "representatives" and "other official persons".

(f) United Nations Convention on Jurisdictional Immunities of States and Their Property

76. The United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004, also contains provisions in which organs and persons that enjoy immunity are mentioned. Article 2, paragraph 1(b) (i), for example, refers to "the State and its various organs of government" and (iv) refers to "representatives of the State acting in that capacity", while article 3, paragraph 2, refers to "privileges and immunities accorded under international law to heads of State *ratione personae*".

77. It should be recalled that this Convention does not apply to criminal jurisdiction and therefore falls outside the scope of the topic "Immunity of State officials from foreign criminal jurisdiction".[126] However, the references to the State and its "various organs of government", to "representatives of the State acting in that capacity" and to the "immunity *ratione personae* of Heads of State" are useful for determining the criteria for identifying an "official" for the purposes of the present report. Firstly, these references provide sufficient justification to deduce that there are two different categories of persons to whom immunity *ratione personae* and immunity *ratione materiae* apply, respectively. Secondly, they highlight the representative capacity required for persons to whom immunity *ratione materiae* applies.[127]

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[122] *Yearbook of the International Law Commission, 1972*, vol. II, "Report of the Commission to the General Assembly", chap. III, sect. B, commentary to draft article 1.

[123] Ibid., para. 4. Although para. 9 of the commentary gives examples, they are limited to diplomatic agents on mission, experts on mission and consular officers as well as certain officials and agents of international organizations.

[124] Ibid., para. 7.

[125] Ibid., para. (10).

[126] See, in this regard, the Commission's commentary to draft article 3, provisionally adopted in 2013, in particular para. 4 thereof and footnote 274 (A/68/10, para. 49).

[127] In this connection, the comments of the Commission contained in paras. 6, 8 and 17 of the commentary to draft article 2 and in paragraph 1 of the commentary to draft article 3 of the draft articles on Jurisdictional Immunities of States and Their Property, adopted on second reading in 1991, are of interest. See *Yearbook of the International Law Commission, 1991*, vol. II, Part Two (United Nations publication, sales No. E.93.V.9 (Part 2)), chap. II, sect. D.

78. From a terminological point of view, it should be noted that the expression "official" is used neither by the International Law Commission in the Draft Articles on Jurisdictional Immunities of States and Their Property nor in the Convention. As mentioned *supra*, however, reference is made to the State's "organs of government" and "representatives". Also, in relation to those draft articles, the Commission considered at the time that the phrase "organs of State" referred to entities rather than to persons, with the sole exception of the Head of State and the Head of Government, whom it partially included in that category.[128]

(g) Convention on the Prevention and Punishment of the Crime of Genocide

79. With regard to international treaties which define conduct that could constitute a crime, regardless of its connection with international relations, reference to the category of officials appears very early in treaty practice. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, for example, expressly mentions in its article 4 "rulers, public officials or private individuals", in referring to persons who can commit the crime of genocide. Although the Convention contains no definition of these concepts, the reference to "rulers" and "public officials", as opposed to "private individuals", points to the existence of two categories of persons, the first acting in an official capacity and the second in a private capacity. Article 4 does not, however, provide any other information to help differentiate between "rulers" and "public officials", or to help deduce the criteria for determining whether they are acting in an official capacity or not.

80. Nevertheless, the use of the terms "rulers" and "public officials" points to the existence of two different categories of persons who act on behalf of the State, albeit in different capacities. In this regard, it should be recalled that the inclusion of the term "rulers" gave rise to an intense and interesting debate in the Sixth Committee of the General Assembly in 1948, which revealed that, for the majority of States, the terms "ruler" and "public official" are not interchangeable.[129] For example, the representative of Egypt said that "the concept of ruler did indeed include not only the constitutional monarch ... but also ministers and all those exercising governmental power, in contrast to administrative officials";[130] the representative of India drew attention to the need to "include persons exercising authority in the State in addition to public officials and private individuals";[131] while the representative of France said that the term "rulers" "in reality embraced ... those having the actual responsibility of power".[132] That debate remains of interest for the purposes of the present report.

81. Lastly, it should be noted that the proposal by the representative of Belgium[133] to replace the terms "rulers" and "public officials" with "agents of the State", which

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[128] Ibid., commentary to draft article 2, paras. 6 and 8 to 10.

[129] See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 93rd meeting*, pp. 314-322. With regard to the use of the two terms, only the representative of Venezuela stated that "all the rulers of his country were regarded as public officials". He added, however, that "since it was not so in all countries", he did not object to retaining the term "rulers".

[130] Ibid., p. 315.

[131] Ibid., p. 317.

[132] Ibid., p. 315.

[133] Ibid., p. 316.

in his view could be validly used to refer to both categories of persons, was not adopted.

(h) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

82. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, includes the concept of an "official" as one of the components of the definition of torture itself by stipulating that the "pain or suffering" of victims must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (article 1, paragraph 2, *in fine*). Article 2, paragraph 3, refers to orders from superiors as those that come from "a superior officer or a public authority". Lastly, in establishing the obligation of States to criminalize torture in their domestic laws, it once again refers expressly to "a public official or other person acting in an official capacity" (article 16, paragraph 1).[134]

83. For its part, the Committee against Torture has reflected the terminology of the Convention in the general comments which it has adopted to date,[135] adding the expressions "persons who act, de jure or de facto, in the name of ... the State",[136] "officials and those acting on its behalf",[137] "State authorities or others acting in an official capacity",[138] "a superior or public authority",[139] "officials in the chain of command"[140] and "those exercising superior authority — including public officials".[141] In addition, when the Committee states in its general comment No. 3 that the immunity of certain persons is incompatible with the Convention, it uses the expression "agents" of the State.[142]

84. The Convention against Torture does not, however, define the concept of an "official", a "public authority" or "other person acting in an official capacity". Neither has the Committee against Torture defined these concepts to date. The Convention, however, clearly emphasizes the notion of "acting in an official capacity" and uses the qualifier "public" to refer to both "officials" and

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[134] In addition to these explicit references to officials and public authorities, the following categories of persons are mentioned in article 10, paragraph 1, on training measures for the prevention of torture: "law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment".

[135] In paragraphs 3 and 8 (b) of the general comment on the implementation of article 3 of the Convention in the context of article 22, adopted on 21 November 1997, the Committee refers to "a public official or other person acting in an official capacity" (see A/53/44, annex IX). In general comment No. 2, on the implementation of article 2 by States parties, of 24 January 2008, the Committee refers to "officials and others ... acting in an official capacity" (paragraph 15) and "officials" (paragraph 18) (see CAT/C/GC/2). In general comment No. 3, on the implementation of art. 14 by States parties, of 13 December 2012, the Committee refers to "State authorities or others acting in their official capacity" (paragraph 7) and to "public officials" (paragraph 18) (see CAT/C/GC/3).

[136] See general comment No. 2, para. 7.

[137] Ibid., paras. 7 and 15.

[138] Ibid., para. 18; general comment No. 3, para. 7.

[139] See general comment No. 2, para. 26.

[140] Ibid., para. 7.

[141] Ibid., para. 26.

[142] See general comment No. 3, para. 42.

"authorities". The connection of the person with the State and with the performance of State functions is thus made evident. This connection with the State has also been emphasized by the Committee against Torture through its continuous reference to the need for officials, authorities and persons to be "acting in an official capacity or on behalf of the State", and the use of the expression "State authorities", in addition to the statement that persons "are acting in an official capacity on account of their responsibility for carrying out the State function".[143] On the basis of the above, a second identifying criterion can also be deduced, namely the existence of a variety of persons who have such a connection with the State and with the exercise of public functions. These persons do not all conform to the strict concept of an "official", since other formulations such as "authorities" and "agents" are included.[144]

(i) Conventions against corruption

85. For the purposes of the present report, universal and regional conventions adopted since the 1990s to combat the phenomenon of corruption are of particular interest. A common feature of all these conventions is that they revolve around State officials. Consequently, they not only expressly mention this category of persons in their articles but also include definitions of what is meant by an "official".

86. For example, the United Nations Convention against Corruption, adopted on 31 October 2003, establishes the following in its article 2 (a):

> 'Public official' shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a 'public official' in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, 'public official' may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.

87. The Convention also refers to a "foreign public official", which it defines as "any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise". The reference to "public officials" and "foreign public officials" is maintained uniformly throughout the Convention,[145] although some of its provisions also refer to "civil servants" as a separate category of "public official".[146]

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[143] See general comment No. 2, para. 17.

[144] The variety of persons connected with the State is made clear in the following list, contained in para. 15 of general comment No. 2: "officials and others, including agents, private contractors, and others acting in an official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law".

[145] See arts. 7, 8, 12, 15, 16, 17, 18, 19, 20, 25, 30, 38 and 52.

[146] See arts. 7 and 30.

88. The Inter-American Convention against Corruption, adopted on 29 March 1996, refers jointly to the terms "'public official', 'government official', or 'public servant'", which it defines in its article I as "any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy".

89. Lastly, the Criminal Law Convention on Corruption (Council of Europe Treaty Series No. 173), adopted on 27 January 1999, establishes the following:

(a) "Public official" shall be understood by reference to the definition of "official", "public officer", "mayor", "minister" or "judge" in the national law of the State in which the person in question performs that function and as applied in its criminal law;

(b) The term "judge" referred to in subparagraph (a) above shall include prosecutors and holders of judicial offices;

(c) In the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law.[147]

90. This definition is also applicable to the Civil Law Convention on Corruption (Council of Europe Treaty Series No. 174), adopted on 4 November 1999, which simply refers to "public officials in the exercise of their functions".[148]

91. The definition of a "public official" contained in Council of Europe Convention No. 173 is of particular interest for the purposes of the present report because, as stated in the Explanatory Report of the Convention:

> The drafters of this Convention wanted to cover all possible categories of public officials in order to avoid, as much as possible, loopholes in the criminalisation of public sector bribery. This, however, does not necessarily mean that States have to redefine their concept of 'public official' in general. In reference to the 'national law' it should be noted that it was the intention of the drafters of the Convention that Contracting parties assume obligations under this Convention only to the extent consistent with their Constitution and the fundamental principles of their legal system, including, where appropriate, the principles of federalism.[149]

92. The autonomy of national systems in defining the persons which each State categorizes internally as "public officials" is thus maintained, but the categories of persons and posts which must be understood to be included as a minimum in the concept of a public official are explicitly stated to avoid loopholes in the prosecution of corruption. In this connection, the reference to "mayors and ministers", who "in many countries ... are assimilated to public officials for the purpose of criminal offences committed in the exercise of their powers" is of particular significance.[150] Similarly, the Explanatory Report refers to "judges" as

[147] See art. 1.

[148] See art. 5.

[149] Para. 27 of the Explanatory Report, which can be consulted in the database of international treaties on the Council of Europe website at http://www.conventions.coe.int/Treaty/en/Reports/Html/173.htm.

[150] Ibid., para. 28.

"holders of judicial office, whether elected or appointed. This notion is to be interpreted to the widest extent possible: the decisive element being the functions performed by the person, which should be of a judicial nature, rather than his or her official title. Prosecutors are specifically mentioned as falling under this definition, although in some States they are not considered as members of the 'judiciary'".[151] This all-encompassing approach adopted by the Convention with regard to the concept of a public official is also reflected in the Additional Protocol to the Criminal Law Convention on Corruption (European Treaty Series No. 191), which extends the scope of the Convention to arbitrators and jurors, both national and foreign.[152]

93. Despite the differences among the various conventions analysed in this section, the following common elements can be deduced from the conventions for the definition of an "official": (a) the term includes persons performing public functions in the name or on behalf of the State; (b) it is irrelevant whether these persons were elected or appointed to that position; (c) it is also irrelevant whether they perform these functions on a permanent, temporary, paid or unpaid basis; (d) it is irrelevant whether they perform these public functions within the executive branch (administration), the judicial branch or the legislative branch; and (e) it is also irrelevant whether they perform these functions in central organs of the State, in other political or administrative structures, or even in public-sector companies or other public-sector bodies. Although it is debatable whether all of these characteristics should be applied in relation to the immunity of State officials from foreign criminal jurisdiction, it is undeniable that they can serve as a basis for identifying the criteria which can be used to define the concept of an official for the purposes of the present topic.

(j) Rome Statute of the International Criminal Court

94. Article 27, paragraph 1, of the Rome Statute establishes the following:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

95. The article lists several persons who fall within the concept of "official capacity", which is irrelevant to the purpose of determining international criminal responsibility. This list is of interest for the present report, given that article 27, paragraph 2, links the concept of "official capacity" to immunity by establishing that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

96. Article 27 is all-encompassing in that it aims to include anyone to whom the concept of "official capacity" can be applied; this reflects to some degree the approach taken by the International Law Commission in its Draft Code of Crimes

[151] Ibid., para. 29.

[152] See art. 1 of the Additional Protocol.

against the Peace and Security of Mankind, adopted in 1996.[153] It can thus be assumed that the concept of "official capacity" includes any person who represents, or acts on behalf or in the name of the State.[154]

97. Article 8 bis of the Rome Statute, on the crime of aggression, defines aggression as a leadership crime, establishing in its paragraph 1 that it is committed by "a person in a position effectively to exercise control over or to direct the political or military action of a State".[155] However, it should be noted that this provision does not alter the contents of article 27 or expand its scope. In fact, the reference to the capacity to effectively "exercise control over or to direct the political or military action of a State" should be understood as a factual element, linked to the person's influence and decision-making power, which applies whether the perpetrator of a crime of aggression is or is not one of persons listed in article 27, paragraph 1.[156] Accordingly, this factual element cannot, in and of itself, be considered a criterion for defining the general concept of an "official", irrespective of whether it applies to any of the persons included in this category.

4. Other work of the Commission

98. On several past occasions, the International Law Commission has had to address the concept of a State official, organ or agent. Cases when this work resulted in treaties have already been analysed within the framework of treaty practice. However, other work done by the Commission may serve as a useful reference for the purposes of the present report, namely, the Nürnberg Principles, the Draft Code of Offences against the Peace and Security of Mankind, and the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

(a) Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgments of the Tribunal

99. In the draft document that set out the Nürnberg Principles, which were subsequently adopted by the General Assembly,[157] in Principle III, the Commission made reference to a person who acted "as Head of State or responsible Government official" and, in Principle IV, to the orders from the "Government or of a superior". While neither Special Rapporteur Spiropoulos nor the Commission provided a

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[153] See paragraphs 102 to 105 *infra*.

[154] The doctrine has also followed this interpretation, on the understanding that the concept of an "official" applies to persons who de facto hold or carry out the functions referred to in article 27 of the Rome Statute. See, inter alia: Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, Munich, C. H. Beck, Portland, Hart, Baden-Baden, Nomos, 2008, pp. 788 and 789; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, pp. 449 and 450.

[155] Similar language is used in the amendments to the Elements of Crimes in respect of article 8 *bis*, approved at the Review Conference of the Rome Statute. See *Review Conference of the Rome Statute of the International Criminal Court*, Kampala, 31 May-11 June 2010, part II.A, resolution RC/Res.6, annex II, "Elements", para. 2.

[156] It should be recalled that the reference to effective control and direction is based on the jurisprudence of the Nürnberg Tribunal in respect of the criminal responsibility of industrialists, who obviously cannot be considered to exercise official functions. On this point, see Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge, United Kingdom, Cambridge University Press, 2013, pp. 178, 179 and 181.

[157] General Assembly resolution 488 (V).

definition of "responsible government official", the commentaries adopted by the Commission make it clear that in both of these cases, especially in Principle III, reference is being made to a person acting in an official capacity, based on the references made by the Nürnberg Tribunal to the "representatives of the State" and individuals "while acting in pursuance of the authority of the State".[158]

(b) Draft Code of Offences against the Peace and Security of Mankind (1954)

100. In article 2 of the first Draft Code of Offences against the Peace and Security of Mankind, adopted on second reading in 1954, the International Law Commission refers to the "authorities of a State" as potential perpetrators of the offences defined therein. Furthermore, article 3 of the Code, which states that acting in an official capacity is irrelevant in respect of the responsibility for such offences, explicitly uses the terms "Head of State" and "responsible government official". However, like the Nürnberg Principles, the Draft Code does not define "responsible government official"; this term is contrasted with "private individuals" in the commentary to draft article 2. In any case, it may be concluded on the basis of this link between the Draft Code and the Nürnberg Principles adopted in 1950 that they both refer to a person acting in the name and on behalf of the State.

101. However, the Commission's work that led to the adoption of the first Draft Code indicates that the definition of the term "responsible government official" was already generating uncertainty at the time. Special note should also be taken of the second report of Special Rapporteur Spiropoulos, which, in its analysis of the positions maintained by representatives of States in the Sixth Committee of the General Assembly, cited in particular the statements made by the representative of Belgium (Mr. Van Glabbeke) and the representative of the Netherlands (Mr. Röling). Mr. Van Glabbeke said that "there was still some confusion regarding the exact meaning of the words 'responsible government official'. Opinions differed: some said 'responsible government official' referred solely to a member of a government ... or even any person occupying an important post in the three important branches of government, the legislative, the executive or the judicial. Some documents referred to highly placed officials and the meaning of that expression was no clearer than the term 'responsible government official'".[159] For his part, Mr. Röling maintained that "the provision concerning the official position of a defendant could not be applied in the same way to major and minor war criminals".[160] Despite these comments, the Special Rapporteur did not address the definition of the concept and the scope of the term "responsible government official" in his report, only indicating that, in the case of the invasion of a territory by the troops of another State, "the simple soldier would not be criminally responsible under international law ... It would go beyond any logic to consider a mere soldier as criminally responsible for an action which has been decided and directed by the authorities of a State".[161] However, in his third

[158] See *Yearbook of the International Law Commission, 1950*, vol. II (United Nations publication, sales No. 1957.V.3, Vol. II), "Report of the International Law Commission to the General Assembly", in particular paras. 103 and 104.

[159] *Yearbook of the International Law Commission, 1951*, vol. II (United Nations publication, sales No. 1957.V.6., Vol. II), "Draft Code of Offences against the Peace and Security of Mankind", para. 85.

[160] Ibid, para. 82.

[161] Ibid. "Draft text to be submitted to governments in application of article 16 (*g*) and (*h*) of the statute of the International Law Commission", sec. II, commentary to art. I.3. This view was

report, which was submitted to the Commission in 1954 and formed the basis for the adoption of the Code on second reading, in draft article 3, the Special Rapporteur referred expressly to the use of the term "responsible government official" ("gouvernant" in French) and, in reference to the discussions in the General Assembly of the Genocide Convention, stated that the term referred to "those having the actual responsibility of power".[162] In any case, in its commentary to the Draft Code, the Commission did not offer any definition of the term "responsible government official".

(c) Draft Code of Crimes against the Peace and Security of Mankind (1996)

102. In several provisions of the Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996, the Commission refers to individuals who would fall within any of the categories set out in the present report. The most relevant provision is article 7, which notes, for the purposes of establishing individual criminal responsibility for the commission of the crimes contained in the Draft Code, that the "official position of an individual who commits a crime [is irrelevant] ... even if he acted as head of State or Government". Additionally, in the commentaries to articles 2, 4, 5 and 16, the Commission also refers, albeit in different ways, to the various categories of persons discussed in this report.

103. When defining individual responsibility and distinguishing it from State responsibility, the Commission refers to the "agent of the State", to an individual who acts "on behalf of the State" or "in the name of the State", or even as "a de facto agent, without any legal power",[163] and particularly emphasizes the fact that "aggression can be committed only by individuals who are agents of the State and who use their power to give orders and the means it makes available in order to commit this crime".[164] The commentaries also contain references to individuals who "are in positions of governmental authority or military command",[165] the "governmental hierarchy or military chain of command"[166] and to "senior

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upheld by the International Law Commission in its report upon adoption of the Draft Code on first reading, particularly in the commentary to art. 2, para. 4, where, with regard to the issue of complicity, the Commission similarly affirmed that "it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of offences against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all the members of the armed forces of a State or the workers in war industries". While these comments obviously refer to the relevance of the seniority of a person to his or her criminal responsibility, they are pertinent because they affirm that a distinction can be made between a "responsible government official" and other persons engaged in acts on behalf of the State, in fulfilment of decisions taken by others. See *Yearbook of the International Law Commission, 1951*, vol. II (United Nations publication, sales No. 1957.V.6, Vol. II), "Report of the International Law Commission to the General Assembly", para. 59, commentary to art. 2.12.

[162] See *Yearbook of the International Law Commission, 1954*, vol. II (United Nations publication, sales No. 59.V.7, Vol. II), "Draft Code of Offences against the Peace and Security of Mankind", Seconde partie, secc. XIV.*c*). The French version of the commentary refers to "ceux qui ont la responsabilité effective du pouvoir".

[163] See *Yearbook of the International Law Commission, 1996*, vol. II, Part Two (United Nations publication, Sales No. E.98.V.9 (Part 2)), chap. II, sect. D, commentary to art. 2, para. 4. The same terms are highlighted by the Commission in the commentary to art. 4.

[164] Ibid., commentary to art. 2, para. 5. See also the commentary to art. 16.

[165] Ibid., commentary to art. 5, para. 1.

[166] Ibid., commentary to art. 5, para. 2.

government officials and military commanders".[167] However, the Commission does not define or list the persons to whom these categories apply in any of the commentaries. In this regard, the commentary to article 7 does not specify what is meant by "the official position of an individual who commits a crime" referred to in the article, although the Commission does clarify the concept by referring to "persons in positions of governmental authority who are capable of formulating plans or policies" and who can "invoke the sovereignty of the State",[168] "individuals who occupy the highest official positions and therefore have the greatest powers of decision",[169] and persons who claim "that the acts constituting the crime were performed in the exercise of [their] functions".[170]

104. It must thus be inferred from these references that the individuals referred to in the aforementioned provisions of the Draft Code have a connection with the State (the person is an agent of the State, an official or a military officer, or acts in the name or on behalf of the State) and exercises some sort of governmental authority or power, including at the highest level. These qualities are especially pertinent when setting out the criteria for identifying an "official" for the purposes of the present topic.

105. Lastly, it should be noted that the Commission has not used a specific term to refer to such persons either, with the exception of the Head of State. With respect to other individuals, it only mentions their "official position" in article 7, or refers to "government officials and military commanders", "the highest official positions" or "positions of government authority or military command" in the commentaries to the articles.

(d) Draft Articles on Responsibility of States for Internationally Wrongful Acts

106. The Draft Articles on Responsibility of States for Internationally Wrongful Acts[171] contain several provisions that are germane to the present report, especially the articles in chapter II, concerning attribution to a State of conduct by persons and entities. These provisions are interesting because they refer to different categories of persons (or entities) which act in the name and on behalf of the State and which therefore fall within the concept of an "official" analysed in the present report.

107. With this in mind, it should be noted that articles 4 and 5 of the draft articles refer to two separate categories, described respectively as "organs of a State" and "persons or entities exercising elements of governmental authority" though not organs of a State. According to draft article 4, a State organ is any person or entity that "exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of the territorial unit of the State" (paragraph 1). That person or entity must, moreover, have the "status [of an organ] in accordance with the internal law of the State" (paragraph 2). Draft article 5 refers to a "person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority".

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[167] Ibid., commentary to art. 2, para. 14 and commentary to art. 5, para. 3.
[168] Ibid., commentary to art. 7, para. 1.
[169] Ibid., commentary to art. 7, para. 5.
[170] Ibid., commentary to art. 7, para. 6.
[171] A/56/10 and Corr.1, para. 76.

Although draft articles 4 and 5 refer to both persons and entities, only the reference to persons is relevant for the consideration of what constitutes an official.

108. The commentaries to the draft articles contained in chapter II also present interesting points. For instance, the introductory commentary to chapter II sets out the general rule that "the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State".[172] The conduct of a State organ is attributable to the State "irrespective of the level of administration or government at which the conduct occurs",[173] which means that in practice there can be a variety of persons or officials who act as agents of the State. The essential element for attributing conduct to a State is that an official must be acting as an organ of the State, regardless of the particular motivation the official may have. Furthermore, what is relevant is not the internal function the agent performs w thin the State, but rather the fact that he performs "public functions" and exercises "ı ublic powers".[174] As to the concept of an official, the commentary to this provision makes it clear that even conduct by lower-level staff, if performed in an official capacity, can be attributed to the State. As the Commission indicates in its commentary to draft article 7, the central issue is whether "the conduct was performed by the body in an official capacity or not".[175]

109. In addition, when considering the scope of such governmental authority, the Commission pointed out in its commentary to article 5 that the term "governmental" is necessarily imprecise. In order to define it, "of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise".[176] In internal law, the connection between the State and the subject exercising elements of governmental authority can take various forms. However, in international law, the main point is that the act performed be regarded as an official "governmental" act. Such authority can be exercised even by de facto organs or agents if they are "in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority" (article 9).

110. Thus, the Draft Articles on Responsibility of States for Internationally Wrongful Acts offer significant elements that help determine the criteria for defining the concept of an "official" for the purposes of the present topic, namely (a) the existence of a connection between the individual and the State, which can take different forms; (b) the fact that the individual is acting on behalf of the State; and (c) the requirement that the individual should be exercising official governmental functions and prerogatives.

5. Conclusions

111. On the basis of the foregoing study of the practice, a number of conclusions can be drawn for determining the criteria for identifying what constitutes an official

[172] Ibid., para. 77, Part I, introductory commentary to chap. II, para. (2).
[173] Ibid., introductory commentary to chap. II, para. (5).
[174] Ibid., introductory commentary to chap. II, para (6).
[175] Ibid., commentary to draft art. 7, para. (7).
[176] Ibid., commentary to draft art. 5, para. (6).

for the purposes of the draft articles on immunity from foreign criminal jurisdiction, namely:

(a) The official has a connection with the State. This connection can take several forms (constitutional, statutory or contractual) and can be temporary or permanent. The connection can be de jure or de facto;

(b) The official acts internationally as a representative of the State or performs official functions both internationally and internally;

(c) The official exercises elements of governmental authority, acting on behalf of the State. The elements of governmental authority include executive, legislative and judicial functions.

112. These identifying criteria apply both to those State officials who enjoy immunity *ratione personae* (Heads of State, Heads of Government and Ministers for Foreign Affairs) and to those who enjoy immunity *ratione materiae* (all other officials). The criteria in question, however, are especially relevant in the case of immunity *ratione materiae* because it is not possible to enumerate explicitly the categories of persons to whom it applies. In order, then, to identify a given person as an official, it must be determined on a case-by-case basis if all the criteria are met.

C. Terminology

113. The second question to be considered in connection with the concept of an official concerns the terms employed to designate the persons to whom immunity would apply. As already indicated above, this is a primarily terminological issue, but it goes beyond a mere linguistic preference for one word over another. The choice of terms is governed basically by two criteria: (a) the term must be broad enough in meaning to encompass all the persons concerned; and (b) the term must take account of the previous practice of the International Law Commission. To these two should be added a third consideration: the term chosen must be easily comprehensible — leaving no room for error — to the national officials responsible for applying the rules governing immunity, in particular, judges, prosecutors, attorneys and other law-enforcement officials. It must be borne in mind that such persons, as specialists in their respective legal systems, will necessarily be led to "think" according to the categories and terms of their own internal law. Consequently, in its approach to the issue of terminology, the present report will advocate the use of terms that can in no instance be misinterpreted, especially in the case of terms that have different meanings in different countries, where their use might have the unwanted effect of conditioning the way in which the subjective scope of immunity is interpreted.

114. With this in mind, the first point to be made is that it is obvious from the foregoing analysis of the practice that there is a lack of uniformity in the use of one or several terms to refer to the same persons. Setting aside the express and uniform reference to Heads of State, Heads of Government and Ministers for Foreign Affairs, it must be said that both the jurisprudence and the conventions examined, and even the legal writings, employ different terms to refer to the category of persons at issue in the present report. What is more, it is not always possible in each instance to explain the reason why one term is used rather than another.

115. Taking treaties alone, as an example, the following terms are used in English, alongside their equivalents in Spanish and French:

(a) diplomatic agent ("funcionario diplomático"/"agent diplomatique");[177]

(b) diplomatic agent ("agente diplomatico"/"agent diplomatique");[178]

(c) diplomatic staff ("personal diplomático"/"personnel diplomatique");[179]

(d) consular officer ("funcionarios consulares"/"fonctionnaire consulaire");[180]

(e) consular employee ("empleados consulares"/"employé consulaire");[181]

(f) consular agent ("agente consular"/"agent consulaire");[182]

(g) agent of the sending State ("agentes del Estado que envía"/"mandataire de l'État d'envoi");[183]

(h) administrative and technical staff, service staff ("personal administrativo y técnico y personal de servicio"/"personnel administratif et technique", personnel de service");[184]

(i) representatives ("representantes"/"représentants"), in a general sense;[185]

(j) representative ("representante"/"représentant"), in the context of a special mission;[186]

(k) representative or official ("representante, funcionario o personalidad oficial"/"représentant, fonctionnaire ou personalité officielle");[187]

(l) persons of high rank ("personalidades de rango elevado"/"personnalités de rang élevé");[188]

(m) organs of government ("órganos de gobierno"/"organes de gouvernement"), including in this category Heads of State and Heads of Government;[189]

(n) constitutionally responsible rulers, public officials ("gobernantes y funcionarios"/"gouvernants", "fonctionnaires");[190]

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[177] Vienna Convention on Diplomatic Relations.

[178] Ibid.

[179] Convention on Special Missions, and Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

[180] Vienna Convention on Consular Relations.

[181] Ibid.

[182] Ibid.

[183] Ibid.

[184] Vienna Convention on Diplomatic Relations, Convention on Special Missions and Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

[185] United Nations Convention on Jurisdictional Immunities of States and Their Property.

[186] Convention on Special Missions.

[187] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

[188] Convention on Special Missions, and Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

[189] United Nations Convention on Jurisdictional Immunities of States and Their Property.

[190] Convention on the Prevention and Punishment of the Crime of Genocide.

(o) public official or other person acting in an official capacity ("funcionario público u otra persona en el ejercicio de funciones públicas"/"agent de la fonction publique ou toute autre personne agissant à titre officiel");[191]

(p) superior officer or a public authority ("funcionario superior o autoridad pública"/"supérieur ou autorité publique");[192]

(q) public official ("funcionario público"/"agent public") and foreign public official ("funcionario público extranjero"/"agent public étranger");[193]

(r) civil servants ("empleados públicos"/"fonctionnaires");[194]

(s) public official, government official or public servant ("funcionario público, oficial gubernamental o servidor público"/"fonctionnaire, officiel gouvernemental ou serviteur public");[195]

(t) public official ("agente público"/"agent public");[196]

(u) official capacity ("cargo oficial"/"qualité officielle").[197]

116. As can be seen, not only are the terms employed very varied, but they also do not always correspond to the terms used in Spanish and French.

117. Secondly, an analysis of the work of the International Law Commission that was not incorporated into treaties shows the following terms used in English, followed by their Spanish and French equivalents:

(a) responsible government official ("autoridad del Estado"/"chef d'État ou de gouvernement");[198]

(b) official position ("carácter oficial"/"qualité officiel");[199]

(c) agent of the State ("agente del Estado"/"agent de l'État");[200]

(d) high-level government officials or military commanders ("funcionarios públicos o mandos militares de alto nivel"/"hauts fonctionnaires de l'administration ou chefs militaires") and senior government officials and military commanders ("funcionarios y jefes militares"/"hauts fonctionnaires de l'administration et chefs militaires");[201]

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[191] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

[192] Ibid.

[193] United Nations Convention against Corruption.

[194] Ibid.

[195] Inter-American Convention against Corruption.

[196] Criminal Law Convention on Corruption (Convention No. 173 of the Council of Europe).

[197] Rome Statute of the International Criminal Court. This term includes the Head of State ("Jefe de Estado"/"chef d'État"), Head of Government ("Jefe de Gobierno"/"chef de gouvernement"), a member of a government ("miembro de un Gobierno"/"membre d'un gouvernement"), a member of a parliament ("parlamentario"/"membre d'un parlement"), an elected representative ("representante elegido"/"représentant élu") and a government official ("funcionario de gobierno"/"agent d'un État").

[198] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and Draft Code of Offences against the Peace and Security of Mankind (1954).

[199] Draft Code of Offences against the Peace and Security of Mankind (1996).

[200] Draft Code of Offences against the Peace and Security of Mankind (1996) (commentaries).

[201] Ibid.

(e) State organ ("órgano del Estado"/"organe de l'État");[202]

(f) person exercising governmental authority ("persona que ejerce atribuciones del poder público"/"personne qui exerce des prérogatives de puissance publique").[203]

118. As in the case of the treaties, note should be taken of the variety of terms employed in English and the fact that they do not always correspond to the terms used in the other two languages.

119. The conclusion, therefore, is that there is no term that is used uniformly and regularly to refer to the category of persons analysed in the present report. Moreover, the terms used do not always cover all persons who might, following the criteria described above, be included in that category. On the contrary, some of the terms listed in the two paragraphs above are frequently used to refer to only one category of persons, leaving aside others who would by definition enjoy immunity *ratione personae*. Bearing this in mind, and considering the earlier discussions in the Commission and its use of these terms in its work, the Special Rapporteur believes it necessary to examine in greater detail the terms that appear in the actual title of the topic, namely, "official" in English, "funcionario" in Spanish and "représentant" in French; along with the terms "organ" ("órgano" in Spanish and "organe" in French) and "agent" ("agente" in Spanish and "agent" in French). The following is a brief analysis of the terms, as defined in both general and legal dictionaries, with a view to determining their suitability.

1. "Funcionario"

120. According to the *Diccionario de la Lengua Española Real Academia de la Lengua*, the Spanish term "funcionario" ("official") is defined in the general sense as "a person who holds a public post", although in Argentina, Ecuador and Uruguay it can also mean "a high-ranking employee, particularly in the State hierarchy".[204] These two meanings are not essentially different. On the other hand, various legal dictionaries refer to an official as "a person who performs functions in the administration and is at the service of the State, having voluntarily become part of its organizational structure, and earning his livelihood from those functions",[205] "a person who serves in a public administration in a paid professional relationship, as regulated by administrative law",[206] "a person who performs public functions and is at the service of the State, having voluntarily become part of its organizational structure",[207] and "a person who has been authorized to act in an official capacity"

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[202] Draft Articles on Responsibility of States for Internationally Wrongful Acts.

[203] Ibid.

[204] *Diccionario de la Lengua Española, Real Academia Española de la Lengua*, 22nd ed. Madrid, Espasa, 2001. The definitions read in Spanish: "persona que desempeña un empleo público"; and "empleado jerárquico, particularmente en el estatal".

[205] *Gran Diccionario Jurídico DVE*. J. Rosell and P. Castells, eds. Barcelona, De Vecchi, 1991. The Spanish text reads: "la persona que realiza funciones de la Administración y que está al servicio del Estado por haberse incorporado voluntariamente a la estructura orgánica del mismo, haciendo de la función asumida su medio habitual de vida".

[206] *Diccionario Jurídico Espasa*. Madrid, Espasa Calpe, 1991. The Spanish text reads: "aquellas personas incorporadas a la administración pública por una relación de servicios profesionales y retribu", idos, regulada por el derecho administrativo.

[207] *Diccionario de Derecho*, 2nd. ed. L. Ribó Durán, ed., Barcelona, Bosch, 1995. The Spanish text reads: "la persona que realiza funciones públicas y está al servicio del Estado por haberse incorporado voluntariamente en la estructura orgánica del mismo".

or "who exercises public functions, or holds a government post, either through popular election or by appointment by a competent authority".[208] It should be said in any case that the term "funcionario" is not generally used in Spanish-speaking countries to refer to the Head of State, the Head of Government, the Minister for Foreign Affairs or other government ministers, including, in some cases, other political officials. The more frequent term used is "mandatario" or "dignatario" in the case of the first group and "alto cargo" or "alto funcionario" for the others. Furthermore, the term "funcionario" is not normally used to refer to parliamentarians either, who are called "representantes"; nor, although to a lesser extent, to refer to persons who exercise judicial functions even though they are usually officials in the administrative sense of the word.

121. The term "funcionario" is normally translated as "fonctionnaire" in French, and by "officer", "official", "civil servant" or "public servant" in English.[209]

122. In the case of the French term "fonctionnaire", the non-specialized dictionaries define it as a "public agent who, having been appointed to a permanent post, occupies a professional rank in the hierarchy of the State administration", or is "appointed to exercise a public function",[210] and as a "person who performs a public function" or "who has been appointed to a permanent post at the professional level of a public administration".[211] In the legal dictionaries, the term "fonctionnaire" means an "agent of a public body whose status in the civil service entails appointment to a permanent post and to a professional rank in the hierarchy", or a "person appointed to a permanent post and to a professional rank in the hierarchy",[212] as governed, based on this definition, by administrative law.[213] In the *Dictionnaire de Droit International Public*, an official is taken to be a synonym of an agent of the State ("agent de l'État") and is defined as a "person normally appointed to occupy a permanent post in the State administration, who acts on behalf of the State, having been authorized to exercise public powers as recognized by national legislation and under the authority of the Government".[214]

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[208] *Diccionario de Términos Jurídicos* 2nd ed. I. Rivera García, ed., Orford, New Hampshire, Equity Publishing, 1985. The Spanish texts read: "aquel que ha sido investido con la autoridad de un cargo", and "que ejerce funciones públicas, faena de Gobierno, ya sea por elección popular o por nombramiento de autoridad competente".

[209] *Diccionario Jurídico en Cuatro Idiomas*. Le Docte, ed., Antwerp, Maklu Uitgevers, 1987.

[210] *Le Larousse* (http://www.larousse.fr/dictionnaires/français). The definitions in French read: "agent public qui, nommé dans un emploi permanent, a été titularisé dans un grade de la hiérarchie des administrations de l'État" and "titulaire d'une fonction publique".

[211] *Le Grand Robert* (http://gr.bvdep.com). The definition in French reads: "personne qui remplit une function publique; personne qui occupe, en qualité de titulaire, un emploi permanent dans les cadres d'une administration publique".

[212] *Vocabulaire juridique*. G. Cornu et al., eds., Paris, Presses Universitaires de France, 1987. The definition in French reads: "agent d'une collectivité publique dont la situation dans la fonction publique est caractérisée par la permanence de l'emploi dans lequel il a été nommé et par sa titularisation dans un grade de l'hiérarchie".

[213] *Lexique des termes juridiques*, 20th ed., Paris, Dalloz, 2013. The definition in French reads: "personne nommée dans un emploipermanent et titularisée dans un grade de l'hiérarchie".

[214] *Dictionnaire de droit international public*. J. Salmon et al., eds., Brussels, Bruylant, 2001. The definition in French reads: "personne nommée pour occuper normalement un emploi permanent dans l'administration de l'État et qui agit au nom de celui-ci, ayant été habilitée à l'exercice de prérogatives de la puissance publique dans le cadre des compétences reconnues par la legislation nationale et sous l'autorité du gouvernement".

123. Furthermore, attention should be drawn to the fact that the English term "official", which will be examined later, has a broader meaning than "funcionario" or "fonctionnaire", although on occasion it can have an equivalent meaning. It should also be borne in mind that the Spanish term "funcionario" can correspond also to the term "civil servant", which has a more limited scope as a category encompassing persons belonging to the "civil service", defined as follows: "The civil service is the body of officials ... whose task it is to administer the government ... under the control and direction of Ministers. ... Civil servants do not owe their employment to political allegiance; they are restricted as to the political activities in which they may engage, and remain in post notwithstanding changes of government".[215]

2. "Représentant"

124. The French term "représentant" is defined in the general dictionaries as "a person who has received the power to act in the name of someone, or who performs an act in the name and on behalf of someone",[216] and as "a person who represents or who has received the power to act in its name someone", "a person to whom a social group entrusts political power to exercise it in its name", "a person who has been elected or to whom power has been delegated through an election (in particular legislative power)" or "a person appointed to represent a State or Government before another State or Government".[217] The *Vocabulaire juridique* legal dictionary, however, defines the term "représentant" as "an organ of an authority acting in the public interest or sometimes even a person delegated by that organ",[218] and states that in international relations, the term is used to designate more specifically diplomatic representatives and representatives at an international organization. In a similar vein, the dictionary also mentions representatives in its definition of the term "gouvernant" ("ruler"): "doctrinal term designating all representatives, trustees or holders of public power, in contrast to mere agents and ordinary citizens".[219] For its part, the *Dictionnaire de droit international* defines "représentant" as "an individual duly invested with the power to speak, act and transmit and receive communications on behalf of a subject of international law (a State, an international organization or another entity), being capable, in so doing, of legally binding said subject". It further states: "this term is applied in particular to diplomatic agents ... and to

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[215] *The New Oxford Companion to Law*. P. Cane and J. Conoghan, eds., Oxford, Oxford University Press, 2008. The clarification that follows is also relevant: "This fundamental division among the personnel of central government, often recognized in foreign constitutions in a distinction between 'government' and 'administration', is in the United Kingdom essentially a matter of politics, not law. In law both Ministers and civil servants are 'servants of the Crown'".

[216] *Le Larousse* (www.larousse.fr/dictionnaires/francais).The dictionary gives the terms "agent" and "mandataire" as synonyms. The definition in French is as follows: "personne qui a reçu pouvoir d'agir au nom de quelqu'un, qui accomplit un acte au nom et pour le compte de quelqu'un".

[217] *Le Grand Robert* (http://gr.bvdep.com).The definitions in French are as follows: "personne qui représente, qui a reçu pouvoir d'agir au nom de quelqu'un", "personne à laquelle un groupe social confie le pouvoir politique, pour l'exercer en son nom", "personne qui a été élue, a reçu par élection la délégation d'un pouvoir (surtout du pouvoir législatif)" or "personne désignée pour représenter un État, un gouvernement, auprès d'un autre".

[218] *Vocabulaire juridique*. The definition in French is as follows: "organe d'une autorité agissant dans un intérêt public ou parfois même délégataire de cet organe".

[219] Ibid. The definition in French is as follows: "terme doctrinal désignant, par opposition aux simples agents et aux gouvernés, l'ensemble des représentants, dépositaire ou titulaires du pouvoir public".

delegates at an international conference or in an organ of an international organization", and that it is "used by design to take into account particular situations, making it possible to avoid the use of the traditional terminology for referring to heads of mission".[220] Just as interesting is the definition in the same dictionary of the term "représentativité (ou caractère représentatif)" (representativeness (or representative capacity)) as the "capacity of an organ or person that appears as the image or symbol of the nation which it embodies. This is one of the characteristics attributed to Heads of State to this day".[221]

125. The term "représentant" is usually translated by the terms "representante" in Spanish and "representative" in English,[222] and also on occasion by "agent" in English.[223]

126. In Spanish, the word "representante" is defined in general terms in the *Diccionario de la lengua española* as that "which represents" and as the "person who represents a ... community".[224] The legal dictionaries are no more explicit, since they do not normally include the term "representante" but only the definition of "representación" ("representation"), which is defined as a group "of persons who represent an entity, a community, a corporation or a Government",[225] or as "the legal institution which makes it possible for a person, the person represented, to act through another, called the representative, who acts as a legal substitute for the former".[226] Lastly, in some dictionaries only the term "representación política" (political representation) is specifically defined, with a meaning unique to constitutional law, namely the "relationship between the people and those who act in their name as an embodiment of the body politic".[227]

127. The term "representative" is defined in the general dictionaries as "a person chosen or appointed to act or speak for another or others, in particular ... a person chosen or elected to speak and act on behalf of others in a legislative assembly or deliberative body", or "a delegate who attends a conference, negotiations, etc., so as to represent the interests of another person or group".[228] In *Black's Law Dictionary*, it is defined simply as "one who stands for or acts on behalf of another", also making reference to the concept of "agent".[229]

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[220] *Dictionnaire de droit international public*. The definitions in French are as follows: "personne physique dûment investie du pouvoir de parler, d'agir, de transmettre et de recevoir des communications au nom d'un sujet de droit international (État, organisation internationale ou autre entité) et susceptible, ce faisant, d'engager ce sujet de droit"; "ce terme s'applique notamment aux agents diplomatiques ... ainsi qu'aux délégués à une conférence internationale ou dans un organe d'une organisation internationale"; and "utilisé à dessein pour prendre en compte des situations particulières et permettant d'éviter l'emploi de la terminologie traditionnelle utilisée pour se référer aux chefs de mission".

[221] Ibid. The definition in French is as follows: "caractère d'un organe ou d'une personne qui apparaît comme l'image ou le symbole de la Nation qu'il incarne. Tel est un des caractères attribué encore aujourd'hui aux chefs d'États".

[222] *Diccionario jurídico en cuatro idiomas*.

[223] *Dictionnaire de l'anglais juridique*, Paris, BMS, 2004.

[224] *Diccionario de la lengua española*.

[225] *Diccionario de términos jurídicos*.

[226] *Gran diccionario jurídico DVE*.

[227] *Diccionario jurídico Espasa*.

[228] See www.oxforddictionaries.com.

[229] *Black's Law Dictionary* (B.A. Garner, ed.), 9th ed., St. Paul, West, 2009.

3. "Official"

128. The term "official" is defined as "a person holding public office or having official duties, especially as a representative of an organization or government department".[230] In *Black's Law Dictionary*, an "official" is defined as "one who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers; also termed public official".[231] These definitions are not equivalent to that of "civil service", defined as "the administrative branches of a government" and "the group of people employed by these branches — civil servant",[232] or that of "civil servant",[233] defined as "a member of the civil service", and would correspond better to the concept of "funcionario" examined above.

129. The term "official" is usually translated into Spanish by "funcionario"[234] or "responsable"[235] and into French by "fonctionnaire",[236] but, as can be deduced from the preceding paragraphs, these terms do not have equivalent or interchangeable meanings for the purposes of the present report.

4. "Agent"

130. The Spanish term "agente" (agent) is defined in the *Diccionario de la lengua española* as a "person who acts with the power of another". In the legal dictionaries, it is defined as a "person who acts, operates and performs tasks in the name and on behalf of another", and the term "agencia de Gobierno" ("government agency") is used in the sense of "an entity subordinate to the sovereign, created to perform a government function".[237] In other legal dictionaries, it is defined as "the person who acts or intervenes in the name of another, with powers to achieve a given end",[238] or is simply offered as an equivalent to the concept of administrative organs.[239] Lastly, in one legal dictionary, the only reference to this term is to "diplomatic agent".[240]

131. In French the term "agent" is defined in the general dictionaries as a "person who performs certain tasks on behalf of an individual or a community (a society, government, State, etc.)", and as an "employee in the public or private sector who performs tasks under the control of an authority, or the holder of certain positions who plays the role of an intermediary".[241] It is also defined as a "person entrusted

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[230] See www.oxforddictionaries.com.

[231] *Black's Law Dictionary*. Black's defines the term "officer" as "a person who holds an office of trust, authority, or command. In public affairs, the term refers especially to a person holding public office under a national, State, or local government, and authorized by that government to exercise some specific function".

[232] Ibid.

[233] See www.oxforddictionaires.com.

[234] *English/Spanish and Spanish/English Legal Dictionary* (S. M. Kaplan), 4th ed., Wolters Kluwer, 2013.

[235] Ibid.

[236] *Dictionnaire de l'anglais juridique*.

[237] *Diccionario de términos jurídicos*.

[238] *Gran diccionario jurídico DVE*.

[239] *Diccionario de Derecho*.

[240] *Diccionario jurídico Espasa*.

[241] *Le Larousse* (www.larousse.fr/dictionnaires/francais). The definitions in French are as follows: "personne qui accomplit certaines missions pour le compte d'un particulier ou d'une collectivité (société, gouvernement, État ...)"; "employé des secteurs public et privé exerçant une fonction d'exécution sous le contrôle d'une autorité, ou titulaire de certaines charges jouant un rôle d'intermédiaire". The dictionary offers "émissaire", "mandataire" and "représentant" as synonyms.

with the affairs and interests of an individual, group or country, on behalf of which he/she acts", and is presented as a synonym of "fonctionnaire".[242] The legal dictionaries, for their part, define an "agent" as "any person in the service of a public administration; in this sense, agents differ from rulers, who alone have representative capacity",[243] as "any collaborator of a public service, most often administrative, associated for a certain period with the direct implementation of the specific activities of that service and therefore governed by administrative law",[244] or as a "person recruited by the State, as an employee or as a contractor, to perform certain functions", and as being "entrusted with public functions, on a permanent or temporary basis, on behalf of the State and local communities or independent public institutions".[245] In any case, the preceding definitions refer to an "agent" essentially from the perspective of State administrative law. The legal dictionaries, however, also refer to an "agent" in international law. In this connection, the meanings given to the term in the *Dictionnaire de droit international public* are of particular interest: "a person who acts on behalf of an international legal entity and is entrusted by it with functions or missions, whether public or private ...; a person entrusted with diplomatic or consular functions ...; a person entrusted with non-diplomatic political representation functions", and "in the field of international responsibility, organs of the State or of an international organization".[246]

132. In English, the term "agent" is defined in a generic sense as "a person who acts on behalf of another".[247] In legal terms, an agent is defined as "an employee or representative of a governmental body" (government agent),[248] and as "a person appointed to act for the public in matters pertaining to governmental administration or public business" (public agent).[249] *Black's Law Dictionary* also defines the concept of "public power" as "a power vested in a person as an agent or instrument

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[242] *Le Grand Robert* (http://gr.bvdep.com). The definition in French is as follows: "personne chargée des affaires et des intérêts d'un individu, d'un groupe ou d'un pays, pour le compte desquels elle agit".

[243] *Vocabulaire juridique*. The definition in French is as follows: "toute personne au service d'une administration publique, en ce sens les agents s'opposent aux gouvernants, qui ont seuls la qualité de représentant".

[244] *Lexique des termes juridiques*. The definition in French is as follows: "tout collaborateur d'un service public, le plus souvent administratif, associé pour une certaine durée à l'exécution directe de l'activité spécifique de celui-ci et relevant à ce titre du droit administratif".

[245] *Dictionnaire de droit international public*. The definitions in French are as follows: "personne recrutée par l'État, sous statut ou sous contrat, afin d'accomplir certaines fonctions" and "chargée de fonctions publiques, à titre permanent ou temporaire, aussi bien pour le compte de l'administration de l'État que pour celui des collectivités locales ou des établissements publics autonomes".

[246] Ibid. The definitions in French are as follows: "personne qui agit pour le compte d'une personne juridique internationale, qui est chargé par elle de fonctions ou de missions, soit publiques soit privées ...; personne chargée de fonctions diplomatiques ou consulaires ...; personne chargée de fonctions de représentation politique sans caractère diplomatique ...", and "en matière de responsabilité internationale: organes de l'État ou de l'organisation internationale". In a similar vein, the *Vocabulaire juridique* defines an "agent" as a "term sometimes used in diplomatic documents to designate a person entrusted by a Government with a mission, for example the establishment of official relations with another Government".

[247] See www.oxforddictionaries.com.

[248] *Black's Law Dictionary*.

[249] Ibid.

of the functions of the state", on the basis that "public powers comprise the various forms of legislative, judicial, and executive authority".[250]

5. "Organ"

133. According to the Real Academia Española, an órgano (organ) is a "person or set of persons who act in representation of an organization or legal entity in a specific area of competence".[251] In the Spanish legal dictionaries, the term "órgano administrativo" (administrative organ) is defined as "the persons who carry out a public office".[252] This generic definition includes all types of organs: those which act in a representative and honorific capacity, as well as those which act in return for remuneration as part of a professional career within the administration; those which act by directing others, have the power to give commands and enjoy prerogatives of honour and dignity (authorities); those which act by implementing the decisions of others; and those which perform their functions on a permanent as well as on a temporary basis.

134. The French general dictionaries define "organe" (organ) as "that which serves as an intermediary or spokesperson" and as an "institution responsible for ensuring the delivery of certain State services".[253] In the legal dictionaries, the term "organe" is defined broadly, as the "person or service responsible for performing a given constitutional, administrative or international function".[254] The *Dictionnaire de droit international public* defines it as a "person, group or institution through which a subject of international law performs certain functions", and it is "applied, sometimes in a more limited way, to officials who may represent the State and embody the State in international relations. Examples of organs in foreign affairs are the Head of State, the Minister for Foreign Affairs and diplomatic agents". It is also defined as, "in the field of international responsibility, a person or group considered to be acting in the name of the State and whose acts are consequently attributed to that State".[255] It should be noted that the *Dictionnaire de droit international public* defines the Head of State as the "supreme organ" and the Head of Government as the "superior organ" of the State.[256]

135. Lastly, the term "organ" is defined in the *Oxford English Dictionary* as "a person, body of people, or thing by which some purpose is carried out or some

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[250] Ibid.

[251] *Diccionario de la lengua española*.

[252] *Diccionario de Derecho* and *Gran diccionario jurídico DVE*.

[253] *Le Larousse* (www.larousse.fr/dictionnaires/français). The definitions in French are as follows: "ce qui sert d'intermédiaire, de porte-parole" and "institution chargée de faire fonctionner certains services de l'État". *Le Grand Robert* gives the latter sense in a similar form.

[254] *Vocabulaire juridique*. The definition in French is as follows: "personne ou service chargé de remplir une fonction constitutionnelle, administrative ou internationale déterminée".

[255] *Dictionnaire de droit international public*. The definitions in French are as follows: "personne, groupe ou institution par laquelle un sujet de droit international remplit certaines fonctions", "appliqué parfois de manière plus restreinte aux fonctionnaires susceptibles de représenter l'État, exprimer sa volonté dans les relations internationales. Par exemple: organes des relations extérieures: chef d'État, ministre des affaires étrangères, agents diplomatiques, etc.", and "dans le domaine de la responsabilité internationale, personne ou groupe considéré comme agissant au nom de l'État et dont les actes sont par conséquent imputés à cet État".

[256] Ibid.

function is performed".[257] It has not, however, been given a separate entry in the legal dictionaries consulted.

6. Conclusions

136. The terminological analysis carried out above leads to the conclusion, from the outset, that the terms "funcionario", "official" and "représentant" have different meanings. As indicated at the beginning of this report, these terms do not have uniform or equivalent meanings and therefore cannot be used interchangeably in the various language versions of the draft articles.

137. Of these three terms, only "official" seems suitable for use in a broad sense which generally makes it possible for it to be applied to all categories of persons covered by immunity from criminal jurisdiction. However, its equivalents in Spanish and French ("funcionario" and "fonctionnaire") do not seem to offer the same flexibility.

138. Moreover, it should be noted that the terms "funcionario" and "fonctionnaire" are intricately linked to the conception of an administrative system in which there is a clear distinction between the government and the administration, with the latter being the permanent bureaucratic machinery at the service of the State, in general, and the government in particular. In such case, "officials" ("funcionarios" or "fonctionnaires") are, strictly speaking, permanently linked with the administration and serve the State within the administration, but are not part of the political apparatus and usually do not perform representative functions, unlike members of the government, in the broad sense of the word. In this connection, it appears that the terms "official", "funcionario" and "fonctionnaire" are not the most suitable for designating the group of persons who are the subject of the present report.

139. On the other hand, the term "representative" and its equivalents in the other languages put the emphasis on the representative capacity of the persons to whom they apply. This therefore raises the question whether the term in question is the most suitable for referring to all the categories of persons to whom immunity from foreign criminal jurisdiction may apply, including Heads of State, judges, military officers and police officers, to name but a few. This question is particularly relevant in the context of the present topic because the International Law Commission has concluded that persons who can benefit from immunity are those who either represent the State or perform public functions. In this connection, it is important to consider the need to differentiate the representative capacity of a person from the possibility of that person's acts being considered to have been "carried out in an official capacity", or to be attributable to the State. The person's representative capacity is governed by norms of international law in the case of the Head of State, the Head of Government and the Minister for Foreign Affairs. However, all persons who may enjoy immunity *ratione materiae* may not necessarily have representative capacity per se, given that this capacity would depend on the norms of domestic law that confer powers and functions to them and that constitute the legal basis on which they perform acts for which they may one day claim immunity from criminal jurisdiction. Consequently, the term "representative" also does not appear to be the most suitable for referring in general to all persons who are the subject of the present report.

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[257] *Oxford English Dictionary* (www.oed.com).

140. Of course, international instruments do not always use identical terms to refer to the same categories of persons, given the need to take into account the necessary flexibility imposed by multilingualism on the drafting of international legal texts. On the other hand, it should be borne in mind that the Commission itself has sometimes used different terms in different draft articles to refer to the same categories of persons. However, an analysis of the lists of terms in paragraphs 115 and 117 *supra* confirms the tendency to always use the same term or relatively similar terms to refer to the same categories of persons in a specific instrument.

141. The Special Rapporteur believes that this same practice should also be followed in the case of the draft articles on immunity from foreign criminal jurisdiction; in this connection, consideration should be given to the use in all language versions of the terms "agent of the State" or "organ of the State". Both terms have the advantage of being ordinarily used in international practice to refer to a person connected with the State and who acts in the name and on behalf of the State. Furthermore, the broad meaning that both terms seem to usually generate allows them to be used in an all-encompassing sense to refer to persons who represent the State internationally as well as to persons who perform functions that involve the exercise of governmental authority. Lastly, both terms have been used previously in the treaties analysed and by the International Law Commission. However, it should be noted that the Commission opted for the term "organ" in relation to two topics which, despite their conceptual and methodological differences, are still related somewhat to immunity from foreign criminal jurisdiction, namely jurisdictional immunities of States and their property, and the responsibility of States for internationally wrongful acts. Although in both cases the term "organ" refers to persons and entities, nothing prevents it from being used in the present topic to refer to persons exclusively. The use of the term "organ" offers another advantage in that it seems more suitable for referring to the Head of State and the Head of Government, in respect of whom the term "agent" is not frequently used in legal practice or in diplomacy.

142. Consequently, the Special Rapporteur believes that the term "organ" is more suitable for referring to all persons who may enjoy immunity from foreign criminal jurisdiction, and therefore suggests that the Commission take action during the current session on the designation of persons who enjoy this immunity, by amending the title of the topic and indicating that the term "official" used in the draft articles that have already been adopted should be replaced by "organ". Nonetheless, until the Commission makes a decision in that regard, both in the present report and in the draft articles included herein, the term "official" in English, "funcionario" in Spanish and "représentant" in French will continue to be used on a provisional basis.

D. General concept of an "official" for the purposes of the draft articles

143. The draft article proposed below is based on the preceding analysis of the criteria for defining the concept of an "official". It takes into consideration the existence of two categories of persons who are clearly differentiated by the type of immunity applicable to them: immunity *ratione personae* or immunity *ratione materiae*. In this connection, each category is addressed in a separate subparagraph. The proposed definition also takes into account the criteria for defining the concept

of an "official" listed in paragraph 108 *supra* and captured in subparagraph (ii) below.

144. Given that the definition contained in the proposed draft article refers to any person who enjoys immunity, both *ratione personae* and *ratione materiae*, it should be incorporated into the draft article on definitions or terminology, which would become subparagraph (e). The proposal is therefore to include the following subparagraph in draft article 2 (before 3):

Draft article 2 (before 3)
Definitions

For the purposes of the present draft articles:

(e) State official means:

(i) The Head of State, the Head of Government and the Minister for Foreign Affairs;

(ii) Any other person who acts on behalf and in the name of the State, and represents the State or exercises elements of governmental authority, whether the person exercises legislative, executive or judicial functions, whatever position the person holds in the organization of the State.

E. Subjective scope of immunity *ratione materiae*

145. As indicated in paragraphs 12 and 13 *supra*, determining the persons to whom immunity *ratione materiae* applies is one of the normative elements of this type of immunity from criminal jurisdiction. The first criterion for identifying these persons is the existence of a connection with the State, which justifies the recognition of their immunity from criminal jurisdiction in the interests of the State, in order to protect the sovereign prerogatives of the State. This connection with the State is therefore a central element in defining the concept of an "official".

146. This connection is related to the concept of "an act performed in an official capacity", which constitutes the second normative element of immunity *ratione materiae*, but which cannot be identified or confused with same. On the contrary, for the purposes of defining the subjective scope of this type of immunity, reference to the connection with the State must be confined to the observation that the individual may act in the name and on behalf of the State, performing functions that involve the exercise of governmental authority. Accordingly, to define the concept of an "official" for the purposes of immunity *ratione materiae*, the specific content of the act performed by the individual should not be taken into consideration; said content is related to the concept and limits of "acts performed in an official capacity" and, therefore, will be analysed in the next report. In short, the existence of a connection between the beneficiary of immunity *ratione materiae* and the State should be taken to mean that the person in question is in a position to perform acts that involve the exercise of governmental authority. Whether a specific act performed by an official benefits from that immunity or not would depend on the existence or non-existence of the two normative elements of such immunity, namely whether the act in question can be deemed an "act performed in an official capacity", and whether said act was performed by the person at a time when he or she was an official of the State.

147. This is an important detail because, given the variety of State practices, it is possible to find persons who have formal connections with the State but are nonetheless not assigned to functions involving the exercise of governmental authority. They include doctors, professors, transit system operators, administrative officials or personal service staff members who, in some national administrations, have an official role but could not be considered — as a rule and based solely on this link with the State — to perform functions in the exercise of elements governmental authority. In this connection, it should be recalled that although officials are afforded immunity from foreign criminal jurisdiction in order to guarantee State sovereignty, such immunity can only be recognized for persons who are in a position to exercise State prerogatives or governmental authority.

148. The International Law Commission had previously addressed the concept of governmental authority but without defining it. However, in the elaboration of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, it used the expression on various occasions and, in the commentaries to the relevant articles, it gave some isolated examples of what constitutes governmental authority, including the functions of the police,[258] powers of detention and discipline pursuant to a judicial sentence or to prison regulations, or immigration control and quarantine.[259] The lack of a definition of the concept of "governmental authority" may be ascribed to the variety of scenarios that can exist in practice and that necessitate a case-by-case analysis. "Of particular importance will be not just the content of the powers, but the way they are conferred ... the purposes of which they are to be exercised and the extent to which the entity is accountable to government for their exercise".[260] In any case, there is no doubt that the concept of "governmental authority" must be understood in a broad sense to include the exercise of legislative, judicial and executive prerogatives.

149. In any event, the relevant element for the definition of an "official" for the purposes of immunity *ratione materiae* is the possibility that the person may exercise elements of governmental authority based on the powers conferred by domestic law. Accordingly, the rank of the official is not, in and of itself, a sufficient or autonomous element to warrant a conclusion that the person is a State official for the purposes of the present topic. The practice analysed *supra* makes it clear that immunity *ratione materiae* is ordinarily claimed in relation to high- and mid-ranking officials; claims of such immunity in respect of low-level officials are extraordinary, having occurred on very few occasions. This practice confirms the point mentioned above, since high- and mid-ranking officials are most often the ones empowered to perform functions in exercise elements of governmental authority. However, that other low-ranking officials may exercise the same prerogatives in specific circumstances cannot be ruled out *prima facie*. Clearly, the existence of a connection with the State that puts a person in a position to exercise governmental authority does not depend automatically on formal criteria such as the person's rank or the legal status of the post or the function performed; rather, the weight that these formal elements may have in determining whether a person may exercise elements of governmental authority will depend on each specific situation

[258] See A/56/10 and Corr.1, para. 77, para. 6 of the introductory commentary to chap. II of the draft articles and para. 5 of the commentary to draft article 5.

[259] Ibid., para. 2 of the commentary to draft article 5.

[260] Ibid., para. 6 of the commentary to draft article 5. The Commission stated at the time that "what is regarded as 'governmental' depends on the particular society, its history and traditions".

and requires a case-by-case analysis. In short, it cannot be concluded that persons who have a connection with the State that allows them to be considered officials in the broad sense necessarily enjoy immunity *ratione materiae*, nor can it be concluded that only high-ranking officials enjoy such immunity.

150. Lastly, it should be noted that, as the Commission has indicated,[261] a former Head of State, a former Head of Government and a former Minister for Foreign Affairs may also benefit from immunity *ratione materiae*. Such persons should therefore been considered as being included in the scope of this type of immunity, since there is no doubt that during their term in office they all had a connection with the State that put them in a position to exercise governmental authority.

151. In the light of the foregoing, the following draft article is proposed; it follows the same pattern as the draft article on the subjective scope of immunity *ratione personae* adopted by the Commission in 2013.

Part Three
Immunity *ratione materiae*

Draft article 5
Beneficiaries of immunity *ratione materiae*

State officials who exercise governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction.

IV. Future workplan

152. In her next report, the Special Rapporteur proposes to conclude her analysis of the other normative elements of immunity *ratione materiae*, namely the concept of an "act performed in an official capacity" and the temporal scope of the immunity. She also proposes to address the exceptions to immunity from foreign criminal jurisdiction. With that report, she will conclude her study of the substantive aspects of the immunity, reserving the procedural aspects thereof for a subsequent report.

[261] See draft article 4, para. 3, as well as the commentary to that draft article, in particular para. 7 thereof (A/68/10, paras. 48 and 49).

Annex

Proposed draft articles

Draft article 2 (before 3)
Definitions

For the purposes of these draft articles:

(e) State official means:

(i) The Head of State, the Head of Government and the Minister for Foreign Affairs;

(ii) Any other person who acts on behalf and in the name of the State, and represents the State or exercises elements of governmental authority, whether the person exercises legislative, executive or judicial functions, whatever position the person holds in the organization of the State.

Part Three
Immunity *ratione materiae*

Draft article 5
Beneficiaries of immunity *ratione materiae*

State officials who exercise elements of governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction.